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THE

CRIMINAL APPEAL REPORTS

WITH

SUBJECT INDEX, TABLES OF CASES AND STATUTES CITED.

MARCH 8, 1920, TO JUNE 6, 1921.

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BEFORE

THE LORD CHIEF JUSTICE, MR. JUSTICE SHEARMAN, AND MR. JUSTICE SANKEY.

EMILY DYMOND.

1920
8 *March.*

To the statutory charge of uttering, "knowing the contents thereof, any letter or writing demanding of any person with menaces and without any reasonable or probable cause any property or valuable thing," it is not a defence that accused honestly believed that he had such cause, though the existence of such a belief may properly affect sentence. Miard, 1 *Cox C. C.* 22: 1844, *overruled (on this point).*

Appeal against conviction, on certificate.

Appellant was convicted, at the Exeter Assizes, before Mr. Justice Darling, on February 2nd, 1920, of uttering a letter demanding property with menaces. Sentence was postponed pending the hearing of the appeal. Appellant was released on bail on her own recognisances, to surrender herself to receive judgment if called upon.

R. E. Dummett, for the appellant (under s. 10 of the Criminal Appeal Act, 1907). Appellant was charged with uttering a letter demanding property with menaces contrary to s. 29, sub-s. (1) (i) of the Larceny Act, 1916. She wrote a letter to the prosecutor, in which she said that she was sending him a notice that she was going to summon him for insulting her on "Saturday night, 27 Dec., out rock park, for putting your hand in under my clothes." The letter also said: "I leave this to you to think what you are going to do, paid or gett summons, you can please yourself what to do. I expect a message this afternoon," and "If you like to paid for this I wont say anything, but if you dont I shall," and much more to a similar effect.

The learned judge was wrong in refusing to allow cross-examination of prosecutor to shew that appellant believed that she had reasonable and probable cause for writing the threatening letter. The point is whether appellant had reasonable and probable cause

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8 *March.*

EMILY DYMOND.

Reading L.C.J.
Shearman J.
Sankey J.

for demanding money, or believed that she had reasonable and probable cause. The defence was that an assault had been committed on appellant by prosecutor, and it is submitted that evidence which went to shew that in fact an assault had been committed ought to have been admitted as shewing that appellant had an honest belief that she had reasonable and probable cause for demanding money.

By s. 29 (1) of the Larceny Act, 1916, "Every person who (1) utters, knowing the contents thereof, any letter or writing demanding of any person with menaces and without any reasonable or probable cause, any property or valuable thing . . . . shall be guilty of felony. . . . "

Under that sub-s. four things must be proved: (1) uttering the letter, (2) knowledge of the contents of the letter, (3) demand with menaces, and (4) absence of reasonable and probable cause.

In *Nathalie Miard*, 1 Cox C. C. 22, 1844, Tindal, C.J., directed the jury that the words "without reasonable and probable cause" had reference to the state of defendant's mind at the time of uttering the letter, and that they were to ask themselves the question whether the demand was made at a time when the party making it really and honestly believed that she had good and probable cause for so doing.

In *John Chalmers*, 10 Cox C. C. 450, 1867, the evidence completely negatived any circumstance on which defendant could found any just demand of money, it was left to the jury to consider whether the meaning and effect of the letters was to demand a sum of money of the prosecutor, and to menace or threaten to charge prosecutor with adultery, and also, whether there was any reasonable or probable cause for the demand of the money, or for any of the charges and imputations made in the letters. In that case, *Miard* was considered. There is no case where it has been held, under sub-s. (1) (i), that the truth of the charge is not material, but there are cases which say that under pars. (ii) and (iii), the truth of the charge is not material.

[THE LORD CHIEF JUSTICE: In offences subject to sub-s. (i), (ii) and (iii), the truth of the charge is not material.]

I rely on *Miard*.

1920
8 *March.*

EMILY DYMOND.

Reading L.C.J.
Shearman J.
Sankey J.

[The LORD CHIEF JUSTICE: We are considering whether that decision is right. It was questioned in *Craig*, 29 Victoria L. Rep. 28, 1903.]

It is submitted that the direction given in *Miard* is right. The right to prove honest belief involved the right to prove reasonable and probable cause.

[SHEARMAN J.: Is it a question of fact for the jury, or is it a question of the state of mind of the defendant?]

It involves the state of mind of defendant. The statute contemplates that even if there are threats with menaces, the prosecution has to disprove reasonable and probable cause. When that defence is raised, the defence is entitled to go into all the facts and cross-examine the prosecutor, not only with regard to the fact that there was reasonable and probable cause, but to that whether defendant honestly believed that she had reasonable and probable cause for making the demand. An assault is a good ground of an action for damages, and the person assaulted, therefore, has reasonable and probable cause to demand money.

Sir R. D. Muir (with him *W. T. Snell*), for the Crown. The section under consideration has given rise to great difficulty in practice, because the right to cross-examine prosecutor with regard to credit is very often in conflict with decisions on the later sub-ss. with regard to the right to give evidence of the truth of the charge made by the blackmailer. If prosecutor gives evidence on a material point and that is disputed by the defence, the defence is entitled to cross-examine with regard to credit. Where the defence does not dispute any statement made by prosecutor, cross-examination is inadmissible. Where the matter which is the subject of the letter demanding money with menaces would give rise to a civil action, cross-examination and evidence to establish "reasonable and probable cause" is permissible. But if it goes beyond that and is a matter which affects the State then it ought to be excluded. Where there is a crime which is an offence against the State, the citizen whose duty it is to prosecute cannot be heard to say that it was a reasonable cause for making the demand. The offence referred to in the letter in this case was not one which could be the ground of

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8 *March.*

EMILY DYMOND.

Reading L.C.J.
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demanding money. It was an offence against the State, and therefore the cross-examination was properly excluded. The direction given by Tindal, C.J., in *Miard* was questioned in the Australian case of *Craig*.

Richards, 11 Cox C. C. 43, 1868, was a case under s. 47 of the Act of 1861.

Dummett replied.

C. a. v.

17 *March.*

The LORD CHIEF JUSTICE: The appellant was convicted on an indictment under s. 29, sub-s. 1, par. i, of the Larceny Act, 1916, charging her with uttering, knowing the contents thereof, a letter to "A.B.," with menaces and without any reasonable or probable cause. Sentence was postponed by Mr. Justice Darling pending the hearing of the appeal to this Court upon the certificate of the learned Judge, and the accused was released on bail on her own recognisances to surrender herself to receive judgment if called upon.

After the case had been opened and the prosecutor had given his evidence in chief, counsel for the accused indicated the defence he intended to put forward, and invited the learned Judge's ruling on the materiality and regularity of a cross-examination which he proposed to administer to the prosecutor for the purpose of eliciting facts relevant to the issue which he intended to raise as a defence. He contended that if he could establish that she believed she had reasonable and probable cause for writing the threatening letter she would be entitled to an acquittal upon the authority of Tindal, C.J., in *R.* v. *Miard*, 1 Cox C. C., p. 22, 1844. After argument Darling, J., came to the conclusion that if the accused did establish that she believed she had reasonable and probable cause for making the demand it would be no defence unless she could establish that she had in fact reasonable and probable cause for making it. Counsel then intimated that he could take no further part in the trial as, although he made no admission, he was not instructed to put forward any defence other than that indicated by him, upon which the learned Judge had ruled against him.

The question before this Court depends upon our view of the words of the statute, which are, "every person who utters, knowing the contents thereof, any letter or writing demanding of any person with menaces and without any reasonable and probable cause any

property or valuable thing, shall be guilty of felony." (See s. 29, sub-s. 1 (i) Larceny Act, 1916.) In substance the language used in this consolidating statute is a re-enactment of the offence constituted by statute 7 & 8 Geo. 4, c. 29, s. 8. In *R.* v. *Hamilton*, 1 C. & K., p. 212, 1843, it was decided by Baron Rolf that the words "without any reasonable and probable cause" in the above-mentioned statute 7 & 8 Geo. 4, applied to the money demanded and not to the accusation constituting the threat. The decision in *R.* v. *Chalmers*, 10 Cox C. C., p. 450, 1867, is to the same effect. In this case Kelly, C.B., left it to the jury to determine whether there was any reasonable and probable cause for demanding the money. In the argument in that case before the Court for Crown Cases Reserved reference was made to *R.* v. *Miard*, and it was contended that the question whether the accused honestly believed that she had reasonable ground for making the demand, should have been left to the jury, but the Court being of opinion that there was no circumstance proved upon which any just demand or belief in such demand could have been founded affirmed the conviction without expressing any opinion on the decision of Tindal, C.J.

In our judgment the question must be determined solely by reference to the language of the statute. The words are "without any reasonable or probable cause," and nothing in the original statute or in the consolidating statute suggests that an honest belief by the accused in a reasonable or probable cause for the demand would negative the crime.

In order to constitute the offence, it must be proved that the accused (1) uttered the writing, (2) demanded property or valuable thing with menaces, (3) knew the contents of the writing, and (4) had no reasonable or probable cause for making the demand. It is for the jury to decide whether there was reasonable or probable cause for making the demand, and it is not for them to decide whether the accused believed that she had reasonable and probable cause for making it. The belief of the accused may, of course, be taken into consideration by the Judge in passing sentence, but in our view it is not material in ascertaining whether the crime has been committed. We do not think that the direction in *R.* v. *Miard*, which was given at assizes on the facts of a peculiar case, and introduces words not found in the statute, is one which has been or should be followed. It is interesting to observe that in *R.* v. *Craig*, 29 Victoria L. R., p. 28, a decision of the Supreme

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17 *March.*

EMILY DYMOND.

Reading L.C.J.

Court of Victoria, the Judges held that *R.* v. *Miard* should not be followed, as it did not leave the question to the jury in the words of the statute.

Nothing that we have said in the present case is intended to cover more than that which is strictly necessary for the decision of this case. It is undesirable to deal with hypothetical cases which are not before us. It must be remembered that the decision of the learned Judge was given after a statement by counsel about the question he wished to raise and was not a ruling that counsel could not put specific questions or that specific evidence tendered should be rejected. It was merely a decision that the belief by the accused that she had reasonable and probable cause for making the demand of money, by proving that she believed prosecutor had committed an indecent assault upon her, would not entitle her to an acquittal.

The result of our decision is that the appeal is dismissed and the appellant must surrender at the next assizes for sentence.

Appeal dismissed.

T. W. M.

BEFORE

THE LORD CHIEF JUSTICE, MR. JUSTICE COLERIDGE, AND MR. JUSTICE AVORY.

JOSEPH STAFFORD.

1920
22 *March.*

Severity of sentence.
In sentence regard must be had to the nature of previous offences.

Appeal against conviction and sentence.

Appellant was convicted at the Birmingham City Sessions, before the Assistant Recorder, on February 2nd, 1920, of larceny and was sentenced to four years' penal servitude.

The Hon. Reginald Coventry, for the appellant (who was present). The story of the prosecution was that appellant met a woman in the Hotel Métropole, Birmingham, and stole from her a diamond ring. The woman did not complain until the following day. She subsequently identified appellant at the Birmingham races, as the man who she said had stolen her ring. There was considerable evidence called to establish an *alibi*, but the jury obtained no assistance at all from the summing up of the Assistant Recorder on that question. There were vital matters not pointed out at all in the summing up. There was no direction at all on the question of identity nor on the question of an *alibi*. The present case is on all-fours with *Thomas Finch*, 12 Cr. App. R. 77, 1912.

D. L. Finnemore for the prosecution. To succeed, the appellant must shew a non-direction which in effect has brought about a miscarriage of justice. In this case there is no miscarriage of justice. The case is entirely different from *Thomas Finch*.

Coventry replied.

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22 *March.*

JOSEPH STAFFORD.

Reading L.C.J.

The LORD CHIEF JUSTICE, after dealing with the facts, said: We cannot say that the summing up is satisfactory. There are some things which might have been said and ought to have been said. But that does not make the non-direction equal to a misdirection in law, and the conviction must stand.

With regard to the sentence, no doubt this man had a bad record, but his previous offences were of an entirely different character from the present offence. We have come to the conclusion that the sentence is too severe and should be reduced to twelve months' imprisonment with hard labour.

Sentence reduced.

Solicitors for the Appellant—*Phillip Baker & Co.*, Birmingham.

Solicitors for the Respondent—*W. J. Day*, Birmingham.

T. W. M.

JAMES HARRY BONNER.

Severity of sentence in view of only one previous conviction.

Appeal against sentence.

Appellant was convicted at the Winchester Assizes, before Darling J., on November 13th, 1919, of house-breaking, and was sentenced to three years' penal servitude.

Appellant in person.

No counsel appeared.

The LORD CHIEF JUSTICE: The appellant was out of time in appealing against his sentence, but an application for an extension of time has been made and granted. We have gone into all the facts of this case and have come to the conclusion that, having regard to the fact that there has been only one previous conviction against him, the sentence ought to be reduced to nine months' imprisonment with hard labour.

Sentence reduced.

HAROLD MIFFLIN, alias HAROLD MALCOLM REDGRAVE. 1920 22 *March.*

Severity of sentence.

Appeal against sentence.

Appellant was convicted at the Stoke-on-Trent Sessions, before the Recorder, on Feb. 17th, 1920, of obtaining money by fraud, and attempted false pretences, and was sentenced to twelve months' imprisonment with hard labour, and two years' imprisonment (consecutive).

Appellant in person.

No counsel appeared.

Lord Coleridge J.: The accused was a victim of the drug habit, and the Recorder thought that a long period of imprisonment would be good for his health and morals. We think that the sentences are over-grave, and should be reduced to twelve months' imprisonment with hard labour on each indictment, concurrent.

Sentence reduced.

T. W. M.

The Court (The Lord Chief Justice, Bray and Avory JJ.) also sat on March 30th, and (The Lord Chief Justice, Bray and Roche JJ.) on March 31st.

BEFORE

THE LORD CHIEF JUSTICE, MR. JUSTICE BRAY, AND MR. JUSTICE AVORY.

1920
29 *March.*

FREDERICK ROTHWELL HOLT (*a*).

"Uncontrollable impulse" is not a defence, unless it amounts to absolute insanity, and the Court will not regard medical evidence which is merely a speculation upon such a theory and does not vouch for insanity in the sense defined by the judges in MacNaughten's *case.*

Sir Edward Marshall-Hall, K.C. (with him *Wingate Saul, K.C.*, and *Bertram Long*) for the appellant, who was present. This is an application on a point of law for leave to call further evidence with regard to the state of the appellant's mind. Evidence is now available tending to show the presence in appellant either of mental disease, or mental infirmity falling short of disease, of such a character as to deprive him of the power of controlling impulse.

MacNaughten's case is regarded as the authority in law relating to criminal responsibility and insanity. The pronouncements in that case are extra-judicial, and, in any event, should now be reviewed. It is the duty of the lawyer to keep pace with the scientist. (Cf. the remarks of Doe J. in *Boardman* v. *Woodman,* 47 New Hampshire Rep. pp. 147, 180, and see *Parsons* v. *State,* 60 A. R. 193, and *Brown's* case, 9 Fraser, 67, 76: 1907.) The criteria of responsibility should be extended as indicated by Blackburn L. J. and Stephen J. in their evidence before the Select Committee on the Homicide Bill, 1874, and as endorsed by Cockburn L. C. J. in his memorandum thereon.

Adverse criticism has been directed to the principles enunciated in *MacNaughten's* case by such eminent authorities as Maudsley and Taylor. The limitations of the answers given by the judges

(*a*) See 14 Cr. Ap. R. 152.

1920
29 *March.*

FREDERICK ROTHWELL HOLT.

Reading L.C.J.
Bray J.
Avory J.

in that case were felt by them then to be—as they surely are now —inconsistent with current scientific opinion.

Stephen, thirty years ago, attacked *MacNaughten's* case in his History of the Criminal Law. That two, at any rate, of the present judges have concurred in Stephen's view is evident from the directions given to the jury in *Hay*, 22 Cox, 268: 1911, and *Fryer*, 24 Cox, 404: 1915, by Darling J. and Bray J. respectively.

The Supreme Court of Good Hope in *Hay*, 9 C. T. R. 292; 16 S. C. 290: 1899, reviewed all the authorities, legal and scientific, and refused to be bound by *MacNaughten's* case, regarding the answers given therein to be extra-judicial, and, in any event, inconsistent with modern scientific opinion. That Court, under Villiers C. J., adopted what, it is submitted, are the true criteria, the findings in *MacNaughten's* case as interpreted, or perhaps extended, by Stephen in his Digest of the Criminal Law. In the same year as *Hay* (1899) the Queensland Code reproduced this more humane view of the law on criminal responsibility and insanity; a view that had already found expression in words in the German Penal Code, and in practice in the administration of the French Penal Code.

A man's will power may be so deficient as to prevent him from controlling his impulses, and he may commit the crime as the result of uncontrollable impulse.

The LORD CHIEF JUSTICE: You say that facts have been discovered since the trial, which enable you to put forward evidence now of his sanity. The Court has a discretion, and we think, subject to anything the Crown may have to say, that it is better that we should hear it.

Merriman, K.C., for the Crown. The question whether the appellant was suddenly overcome by uncontrollable impulse was left to the jury and decided by them against the appellant. The Court will not act on the further evidence unless legal insanity is shown. See *Thomas*, 7 Cr. App. R. 36: 1911.

After further argument the objection was withdrawn.
Medical and other evidence was then called.

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29 *March.*

FREDERICK ROTHWELL HOLT.

Reading L.C.J.
Bray J.
Avory J.

Sir E. Marshall-Hall, K.C., referred to *Layton*, 4 Cox, C. C. 149: 1849; *Wright* v. *Doe* d. *Tatham*, 7 Ad. & E. 313: 1837; *Hay*, 16 Buchanan's Cape of Good Hope Reports, 290.

The *Attorney-General* (with him *Merriman, K.C.*, and *Gilbert Jordan*), for the Crown, were not called upon to argue.

The LORD CHIEF JUSTICE, after dealing with the facts, said: The grounds of the appeal are three. The first is that evidence had been wrongly admitted, but the answer to that ground is that the evidence objected to was evidence from which the knowledge of the appellant could be inferred, and that ground therefore fails. Then the Court has been asked to inquire into the tests of insanity laid down in *MacNaughten's* case in 1843, and to extend those tests so as to include "uncontrollable impulse." But it is not necessary to consider whether the tests as laid down in that case ought to be enlarged. It is sufficient for this case to say that Mr. Justice Greer left the question of uncontrollable impulse to the jury, and the jury negatived the defence founded on it. The evidence called before the Court to-day has not advanced the case, because it was based on hypothetical speculations. It is substantially the same as that given at the trial. The tests in *MacNaughten's* case must be observed, and it is not enough for a medical expert to come to the Court and say generally that in his opinion the criminal is insane. There must be some evidence of insanity within the meaning of the rule in *MacNaughten's* case. That is entirely wanting in this case. The appeal fails on all grounds.

Appeal dismissed.

Solicitors for the Appellant—*Callis and Woosnam*, Blackpool.

T. W. M.

BEFORE

THE LORD CHIEF JUSTICE, MR. JUSTICE A. T. LAWRENCE, AND MR. JUSTICE COLERIDGE.

ISABELLA KING.

1920
19 *April.*

On a plea of not guilty there ought to be no suggestion by the Court that that plea should be withdrawn or that there should be a plea of guilty.

Appeal against conviction.

Appellant was convicted, at the Leeds Assizes, before Mr. Justice Roche, on March 20th, 1920, of incest, and was sentenced to seven months' imprisonment.

Robert Macdonald (under s. 10 of the Criminal Appeal Act, 1907) for the appellant, who was not present. Appellant was charged under s. 2 of the Punishment of Incest Act, 1908, which provides that: "Any female person of or above the age of sixteen years who with consent permits her grandfather, father, brother or son to have carnal knowledge of her (knowing him to be her grandfather, father, brother or son, as the case may be) shall be guilty of a misdemeanour, . . ."

Appellant pleaded guilty before the magistrates, but when charged at the Assizes, she pleaded not guilty. She was asked by the Court whether she wanted to withdraw the plea of not guilty and plead guilty, and there was a conversation between her and the warder, after which she pleaded guilty. The section says "with consent permits," and it does not appear that she pleaded guilty to anything more than the fact that her father had had immoral relations with her.

[He was stopped.]

Roland Oliver, for the Crown. Bearing in mind the law as laid down in *Clifford Dimes,* 7 Cr. App. R. 43; 76 J. P. 47: 1911, with regard to the distinction between "permission" and

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19 *April.*

ISABELLA KING.

Reading L.C.J.
Lawrence J.
Coleridge J.

"submission," it is impossible to support the plea of guilty in this case. But the Court has power to direct a new trial on the ground that the trial was abortive.

The LORD CHIEF JUSTICE: The appellant was indicted for incest with her father, who was also indicted for the offence and convicted. He was sentenced to two years' imprisonment with hard labour, and does not appeal.

Appellant was indicted under s. 2 of the Punishment of Incest Act, 1908, and before she can be convicted under that section, it is essential for the prosecution to prove that she "with her consent did permit." Those words mean something more than that she submitted. She first of all pleaded not guilty, but it was thought by the learned judge that some statements by her, appearing in the depositions taken before the magistrates, amounted to an admission of guilt, and the appellant was told that she might withdraw her plea of not guilty. Some discussion took place between the appellant and the warder, the details of which are not known, after which she withdrew her plea of not guilty and pleaded guilty.

Looking at the record as it is before us, and also bearing in mind that there was, as we are told, some conversation between the appellant and the warder, we are satisfied that the conviction ought not to stand, because it is by no means clear that she understood what she was doing or that she intended to admit the statutory offence with which she was charged. It is further open to grave doubt whether she did with her consent permit her father to have carnal knowledge of her. There is evidence that she was almost forced to submit. It is sufficient to say that though we have power, as was held in *Baker*, 7 Cr. App. R. 217; 28 T. L. R. 363: 1912, followed by *Christopher Ingleson*, 11 Cr. App. R. 21: 1914, to send the case back for a new trial, we do not intend to take that course. The appellant has already been in prison for one month. We think that the more merciful as well as the just course is to quash the conviction and we order the appellant's discharge accordingly.

Conviction quashed.

T. W. M.

BEFORE

THE LORD CHIEF JUSTICE, MR. JUSTICE DARLING AND MR. JUSTICE AVORY.

WILLIAM HENRY THOMAS JOLLY.

1920
26 *April.*

Severity of sentence after a long interval since conviction with no previous sentence of penal servitude.

Appeal against sentence.

Appellant was convicted at the Hampshire Sessions, before the Chairman, on April 6th, 1920, of shop-breaking, and was sentenced to five years' penal servitude.

Appellant in person.

DARLING J.: The appellant pleaded guilty to four charges of shop-breaking. He was discharged from the army in 1917. The Court considers the sentence excessive. Appellant had not been convicted for ten years, and had never been sentenced to penal servitude before the present sentence. The sentence will be reduced to three years' penal servitude.

Sentence reduced.

T. W. M.

FREDERICK YATES.

When the same jury has tried different defendants on charges arising out of the same facts there is especial need of a careful direction in the subsequent case.

Appeal against conviction.

Appellant was convicted at the Derbyshire Sessions, before the Chairman, on April 8th, 1920, of larceny, and was sentenced to twelve months' imprisonment with hard labour.

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26 *April.*

FREDERICK YATES.

Reading L.C.J.
Darling J.
Avory J.

Harold Wright (under s. 10 of the Criminal Appeal Act, 1907) for the appellant, who was present. The trial was unsatisfactory. It came on at 7 o'clock in the evening after a long trial in which the husband of one of the witnesses (Mrs. Milner) had been charged with larceny and receiving. The allegation was that appellant took the stolen goods to Mrs. Milner's house. The only evidence against appellant was that of Mrs. Milner. The Chairman in summing-up said: "You must not allow the last case to prejudice you in any shape or form. You must wipe it out of your memory as if you had heard nothing. You heard the evidence of Florence Milner, who, Yates says, has a grudge against him. She says Yates brought the things to the house, and she handed them over to the police in the other case we have to forget about. I don't think I need trouble you further. Counsel has been brief, and I will be brief, too. Consider your verdict." That summing-up was unsatisfactory.

Marshall Freeman, for the Crown. The defence put forward at the first trial was an *alibi*. The defence on this second indictment was a simple denial. It was for the jury to say whom they believed. Though the summing-up was brief there was no misdirection, and the conviction ought to stand.

AVORY J.: The appellant was charged on an indictment the words of which should not be followed as a precedent. He was charged with stealing and receiving a quantity of tins of floor polish "and other goods." It would have been open to the prosecutor to give evidence that he had stolen a horse under the expression "and other goods." An indictment in these terms is quite improper.

It is said that the only evidence against appellant was the evidence of Mrs. Milner. It appears that the husband of this woman had been charged on the same day with stealing a quantity of goods. Milner was either found guilty or pleaded guilty. We are told that the second trial took place at 7 o'clock in the evening, and apparently that is the only explanation that can be afforded of the peculiar circumstances of this case. At the conclusion of the cross-examination of the last witness for the prosecution, the foreman of the jury said: "It is the desire of the jury to say we have heard sufficient evidence to come to a decision.

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26 *April.*

FREDERICK YATES.

Avory J.

The previous case was given on the benefit of the doubt." Then appellant's counsel submitted that there was no corroboration of the woman's statement, and that her evidence could not be trusted without corroboration. Counsel made the submission which was quite accurate. He did not say she was an accomplice. The Chairman said, "Oh, yes," and the appellant was called. Then the Chairman summed up. [As above.] Then the foreman asked if the jury might give a majority verdict. The clerk said, "No, you must be agreed." The jury, after further consideration, found the appellant guilty.

The Court is of opinion that the verdict is not satisfactory. There was no proper direction, and the conviction must be quashed.

Conviction quashed.

T. W. M.

The Court (The Lord Chief Justice, Darling and Sankey JJ.) also sat on May 3rd.

BEFORE

THE LORD CHIEF JUSTICE, MR. JUSTICE SANKEY AND MR. JUSTICE SALTER.

1920
10 *May.*

NORMAN MILNER AND OWSTON ATKIN.

Sentences of detention in a Borstal institution quashed in view of good character.

Appeals against sentences.

Appellants were convicted at Leeds City Sessions, before the Recorder, on April 8th, 1920, of housebreaking, and were each sentenced to two years' detention under the Borstal system.

Appellants were present.

The LORD CHIEF JUSTICE: The only question is what to do with these lads. There is very clear evidence before us that they were hardworking boys. The police said so, and the employer of Milner described him as honest, industrious, and keen to get on in life. He undertakes to reinstate him when he is set at liberty. The other boy has been in good employment for 2½ years. His employer attended the Court to give him a good character. This employer says that the case is one for sympathetic treatment. Atkin has lost a good mother. We very much appreciate these expressions of opinion with regard to the character of these boys. We are glad that their employers are ready to give them work as soon as they are set at liberty.

The boys were released on bail pending the trial, but were detained pending the appeal.

Now they were sentenced to Borstal treatment with the object of reforming them, but we cannot agree with that view, and the report before us is that both boys are unsuitable for Borstal. Employment is offered to them as soon as they are set at liberty. As they have both been hard workers until this occurrence we set them at

liberty, hoping that this will be a lesson to them. We are glad to think that this was a temporary lapse.

The boys will be taken back to Leeds and there released on their own recognisances in the sum of 5*l*. for twelve months to come up for judgment if called upon.

Sentences varied.

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10 *May.*

NORMAN MILNER AND OWSTON ATKIN.

Reading L.C.J.

T. W. M.

GEORGE VINCENT.

On conviction of or plea of guilty to being a habitual criminal there need not necessarily be a sentence to penal servitude.

Appeal against sentence.

Appellant was convicted at the County of London Sessions, before the Deputy-Chairman, on April 13th, 1920, of burglary, and also of being a habitual criminal, and was sentenced to three years' penal servitude, to be followed by five years' preventive detention.

G. St. J. Macdonald for the appellant. The facts of this case are almost on all-fours with *George Stanley*, 14 Cr. App. R. 141: 1920. Judges seem to be under the impression that if they sentence a man to three years' penal servitude and the man is also found by the jury to be a habitual criminal, they must also sentence him to preventive detention. *Stanley* shows that that view is erroneous. On the facts of this case the sentence should be reduced. Appellant had worked honestly for about eighteen months before committing this offence. He had a sister dependent on him. The learned Deputy-Chairman had some doubt about the sentence and suggested an appeal.

J. Austin Metcalfe for the Crown. I am instructed not to argue against a reduction of the sentence.

SALTER J.: The learned Deputy-Chairman passed this sentence with great doubt and hesitation, and suggested an appeal, and he has communicated with this Court in order that the matter might be considered. The appellant's record is a bad one. He has

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GEORGE VINCENT.

Salter J.

been constantly in prison since 1879, and has been sentenced to terms of penal servitude again and again. In 1913 he was convicted as a habitual criminal. In June 1918 he was released. He went to the Discharged Prisoners' Aid Society and obtained employment. For eighteen months or more he worked regularly and well in this employment and then committed this offence. It is not an easy matter to decide what to do with him. We are not impressed by the story about the sister, for the appellant was earning 2*l.* 13*s.* 0*d.* a week. But he had worked honestly and well for about eighteen months, and we are much impressed by that. He, of necessity, pleaded guilty to being a habitual criminal because he had been previously convicted as a habitual criminal. But although he pleaded guilty to being a habitual criminal the Court is not bound to pass a sentence of penal servitude, and, if it does, the Court is not bound to follow it with a sentence of preventive detention. However bad a man's record may have been, it is desirable that any genuine attempt at reform should be encouraged. On the whole we think we should take the course taken in *Stanley's* case, to which reference has been made, and reduce the sentence to one of twelve months' imprisonment with hard labour.

Sentence reduced.

Sentence of preventive detention quashed.

T. W. M.

THOMAS ROBERT JONES.

There ought not to be a conviction for being a habitual criminal unless at the time of the offence primarily found defendant was living dishonestly or criminally.

Appeal against conviction.

Appellant was convicted at the Carnarvonshire Quarter Sessions, before the Chairman, on April 8th, 1920, of office-breaking, and was sentenced to three years' penal servitude. He was also convicted as a habitual criminal and sentenced to five years' preventive detention.

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10 *May.*

THOMAS ROBERT JONES.

Reading L.C.J.
Sankey J.
Salter J.

The Chairman in summing up to the jury said: "A habitual criminal is a person convicted of crime after three previous convictions, and who, by reason of his criminal habits, should, for the protection of the public, be detained for such a period as the Court may consider proper. In this case it has been shewn that the prisoner at the bar has been convicted of a series of indictable offences. It is for you to say whether the commission of crime on his part has become with him a habit. I believe it was stated that he had acted as fireman on board several ships, shewing that at intervals he tried to earn a living, but the question for you to decide, is as I have said, whether the commission of crime, on his part, has become a habit and that he is a danger to the public. If you think that his record justifies this charge of being a habitual criminal it is your duty to find that he is a habitual criminal. But on the other hand, if you are not quite satisfied that the charge has been substantiated it will be your duty to give the prisoner the benefit of the doubt. Will you please consider your verdict."

T. E. Morris (under s. 10 of the Criminal Appeal Act, 1910) for the appellant, who was not present, was not called upon.

Roland Oliver for the Crown.

[The LORD CHIEF JUSTICE: We want to hear you on the direction of the learned Chairman.]

I cannot justify the direction. It is contrary to what has been laid down in this Court.

The LORD CHIEF JUSTICE: The appellant appeals against his conviction as a habitual criminal. This Court has on many occasions pointed out how necessary it is that the judge or Chairman presiding over the tribunal should direct the jury's attention to the question before them. The man is not tried on the charge of being a habitual criminal until the jury have convicted him of an offence meriting a sentence of at least three years' penal servitude. The legislature never intended that a man should be convicted of being a habitual criminal merely because he had a number of previous convictions against him. A person is not to be found

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10 *May.*

THOMAS ROBERT JONES.

Reading L.C.J.

to be a habitual criminal unless he has at least three times previously been convicted of a crime, and is persistently leading a dishonest or criminal life. With regard to the last words the question for the jury is whether since he last came out of prison he has been leading persistently a dishonest or criminal life. The test is not what happened before, but whether he is leading persistently a dishonest or criminal life at the time of the commission of the offence in question. The Chairman never put the true question to the jury. Counsel for the Crown very properly says that he cannot support the direction given by the learned Chairman, for neither of the questions put by the Chairman to the jury is the right one. The right questions are those which must arise on the last words of the section (s. 10 of the Prevention of Crime Act, 1908), and they were never properly put to the jury.

Now, on the facts of this case, it is clear that this man had for a considerable time since his release from prison been leading an honest life, and we cannot help thinking that if the right questions had been put to the jury he would not have been convicted of being a habitual criminal, and that conviction must be quashed. The other conviction with its sentence of three years' penal servitude must stand.

Conviction as habitual criminal quashed.

T. W. M.

BEFORE

THE LORD CHIEF JUSTICE, MR. JUSTICE AVORY AND MR. JUSTICE ROCHE.

WILLIAM CRANE.

1920
17 *May.*

Defendants indicted separately cannot in law be tried jointly. Such a proceeding is a mistrial.

Appeal against conviction.

Appellant was convicted at the Leicester City Sessions on April 9th, 1920, before the Recorder, of receiving stolen property, and was sentenced to twelve months' imprisonment with hard labour.

G. Wightman Powers (under s. 10 of the Criminal Appeal Act, 1907) for the appellant, who was not present. An indictment was preferred against appellant, charging him with having received certain skins well knowing them to have been stolen. A youth named Morton was charged in a separate indictment, which contained two counts, (1) for stealing the goods, and (2) for receiving the same goods. The charge of receiving was made under s. 91 of the Larceny Act, 1861. The section has been repealed and has been substantially re-enacted in s. 33 of the Larceny Act, 1916. Appellant and Morton were tried together, although they were charged under separate indictments. The fact that the two defendants were charged under separate indictments was not brought to the notice of the Recorder or of the counsel appearing in the case, but the fact that there were separate indictments, and no joint indictment, was only discovered after the appellant had given notice of appeal.

[*F. Hinde* for the Crown. It is not contended that the trial was regular.]

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17 *May.*

WILLIAM CRANE.

Reading L.C.J.
Avory J.
Roche J.

One result of trying the two separate indictments together is that evidence was wrongly admitted against appellant. The trial was irregular.

[AVORY J.: Was there a trial at all in this case, which can be recognised?]

The two defendants were given in charge of the jury. Appellant was convicted of receiving and Morton of stealing the goods.

[AVORY J.: Are you not wrong in saying that appellant was properly given in charge of the jury? If they were not properly given in charge the tribunal was not competent to try them.

The LORD CHIEF JUSTICE: Does it not necessarily follow that if two persons, indicted for felony on separate indictments are tried together, there has been no trial?]

The conviction was bad, as on the joint trial evidence was improperly admitted against the appellant.

[The LORD CHIEF JUSTICE: We must take the point whether you take it or not, in view of the information now before us, that there has been no trial.]

It is submitted that the trial was not a nullity, and that this Court cannot order a *venire de novo*: *Bertrand*, L. R. 1 P. C. 520.

The cases of *Baker*, 7 Cr. App. R. 217; 28 T. L. R. 363: 1912; *Christopher Ingleson*, 11 Cr. App. R. 21, 1915; 1 K. B. 512; 84 L. J. K. B. 280; 112 L. T. 313: 1914; and *Golathan*, 11 Cr. App. R. 79; 84 L. J. K. B. 758; 112 L. T. 1048; 79 J. P. 270; 31 T. L. R. 177: 1915; all turned on the same point, namely, that the plea of guilty was wrongly taken. The case of *Wakefield*, 1918, 1 K. B. 216; 13 Cr. App. R. 56; 87 L. J. K. B. 319; 118 L. T. 576; 82 J. P. 136; 34 T. L. R. 210: 1918; followed a number of old cases on writs of error, and depended on the tribunal being defective.

Now this Court cannot order a new trial.

In *Brett and Parish*, 3 Cox C. C. 79, 1848, two defendants separately indicted were tried together by consent.

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17 *May.*

WILLIAM CRANE.

Reading L.C.J. Avory J. Roche J.

F. Hinde for the Crown. A *venire de novo* should issue. It cannot be contended that there was a trial at all in law. The conviction should be quashed and the order made in *Baker* should be followed. The order there made is set out at the end of the report in 7 Cr. App. R. at p. 218, as follows: "The Court . . . doth allow the said appeal, and doth order that the conviction and judgment be set aside and annulled, and that the appellant do appear at the next session of the Central Criminal Court and plead to and answer the said indictment, and that in the meantime the appellant be remanded in custody."

Wightman Powers in reply. Appellant has been in custody since the trial. He was on bail before the trial.

The LORD CHIEF JUSTICE: The appellant, Crane, was convicted of receiving certain *glacé* kid skins, and he was sentenced by the Recorder to twelve months' imprisonment with hard labour. He appeals to this Court against the conviction and alleges misdirection and misreception of evidence. When the matter was before the Court last week it was discovered, before the case was argued, that the appellant had been jointly charged with one Morton, although he and Morton were indicted separately. The appellant, Crane, was convicted of receiving these goods and Morton was convicted both of stealing and receiving, and it was assumed by both counsel, and apparently also by the Recorder, that Morton and Crane were jointly indicted under one indictment. There were in fact four indictments, (1) against Morton for stealing and receiving, (2) against the appellant, Crane, for receiving, (3) against Morton for stealing and receiving, and (4) against the appellant, Crane, for receiving.

At the trial, as we now know, both Morton and Crane were given in charge to the same jury, as if they had been jointly indicted under one indictment, whereas in truth, there were separate indictments. The result is that there never has been a trial at all. It is sufficient for this Court to say that the proceedings were void *ab initio*.

It has been argued that the proceedings were only irregular and that where there was an irregularity in procedure, the Court could not treat the trial as a nullity. But that argument cannot be accepted. The Court must view the proceedings as if there

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17 *May.*

WILLIAM CRANE.

Reading L.C.J.

had been no trial at all, in accordance with the cases of *Baker*, *Ingleson*, *Golathan*, and *Wakefield*. In each of these cases the Court ordered a *venire de novo*, treating the trial as a nullity. In the first three cases, the question was with regard to the plea, which was unsatisfactory, and the Court treated the plea as a nullity although it had in fact been entered. There the Court said there had been a mistrial and the proceedings must be treated as null and void.

In *Wakefield*, it was discovered that a juryman had been personated. The Court came to the conclusion that there had been a mistrial and a *venire de novo* was ordered.

These cases are, in our opinion, authority for the course which this Court now proposes to take, that is, to treat the verdict and sentence as a nullity. Following the course taken in *Baker*, the verdict and sentence are expunged from the record. That being so, there is the indictment against the appellant, on which no trial has taken place. He must stand his trial on that indictment. He must enter into his own recognizances in the sum of 80*l.* and find two sureties for 40*l.* each. Otherwise, the order will be in the same form as the order in *Baker*. The Court allows the appeal and the appellant must enter into the recognizances referred to.

Although Morton has not appealed, he gets the benefit of our decision so far as the indictment here in question is concerned (and of this he will be informed), but it must be borne in mind that he has been convicted on another indictment.

Venire de novo *awarded*.

T. W. M.

HENRY LANE.

Evidence of a previous conviction of defendant improperly given may be so prejudicial to him that the Court will decline to apply the proviso to s. 4 of the Criminal Appeal Act.

Appeal against conviction.

Appellant was convicted at the West Kent Sessions before the Chairman on April 8th, 1920, of false pretences and was sentenced to nine months' imprisonment with hard labour.

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17 *May.*

HENRY LANE.

Reading L.C.J.
Avory J.
Roche J.

W. H. C. Rollo (under s. 10 of the Criminal Appeal Act) for the appellant (who was not present). Evidence of a previous conviction was improperly admitted against appellant. It was referred to by a police constable in cross-examination. There was also misdirection. [He was stopped.]

Lancelot S. Fletcher for the Crown. The evidence complained of came out in the course of a casual answer to a question put in cross-examination. The case of *Williams and Woodley*, 14 Cr. App. R. 135; 36 T. L. R. 251; 84 J. P. 91: 1920; shews that where information about the previous convictions of a defendant has been improperly placed before the jury and he has been convicted the Court can apply the proviso to s. 4 (1) of the Criminal Appeal Act, 1907, if the Court is of opinion that the irregularity did not affect the verdict. In this case the jury could not have come to any other conclusion than that which they came to on the evidence apart from this casual answer. The whole of the defence was set up by means of a statement from the dock. There was no evidence before the jury except that given by the prosecution. The evidence was all one way. There was no evidence controverting the evidence for the prosecution and the jury could not have come to any other conclusion on the evidence before them. Therefore the proviso to s. 4 of the Act of 1907 ought to be applied.

AVORY J.: Appellant was convicted of obtaining a horse by false pretences. At the trial the appellant was not represented by counsel. He had given a cheque for 42*l.* in payment for the horse, and at the trial, he was cross-examining the detective officer to shew that he had received certain moneys by way of deposit at the time he gave the cheque. The whole object of his questions was to shew that he was at that time in receipt of moneys sufficient to put him in credit. This man, on his trial, was prejudiced by evidence thus given by the officer that he had been previously convicted.

It was argued that the jury must have come to the same conclusion and that the Court might give effect to the proviso to s. 4 of the Act of 1907.

It is obvious that the Court cannot come to that conclusion. It was a case in which, if the jury had been properly directed,

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HENRY LANE.
AVORY J.

they might have come to the conclusion that the appellant honestly believed that the cheque would be met. It is not a case in which we can apply the proviso to s. 4. We must hold that the trial was irregular and the conviction must be quashed.

Conviction quashed.

T. W. M.

ARTHUR GEORGE POUNTNEY.

Police supervision not superadded to a sentence when there has been a long interval without a conviction.

Appeal against sentence.

Appellant was convicted at the Lichfield City Sessions before the Recorder on the 22nd April, of embezzlement, and was sentenced to twelve months' imprisonment with hard labour and three years' police supervision.

Appellant was not present.

Roland Oliver for the Crown. I am not instructed to argue for the sentence if the Court thinks it too severe.

The LORD CHIEF JUSTICE: The appellant was convicted and sentenced to twelve months' imprisonment with hard labour and three years' police supervision under the Prevention of Crime Act. He appeals against the sentence of three years' police supervision.

This Court is of opinion that having regard to the length of time which has elapsed between the last sentence and the present offence, which is just upon thirteen years, the sentence of twelve months' imprisonment with hard labour was sufficient in itself and that it was not necessary to pass a sentence of police supervision. That part of the sentence will be quashed and the sentence will stand as one of twelve months' imprisonment with hard labour.

Sentence of police supervision quashed.

T. W. M.

BEFORE

THE LORD CHIEF JUSTICE, MR. JUSTICE SHEARMAN, AND MR. JUSTICE SANKEY.

WILLIAM MULLINS. 1920 *7 June.*

Severity of sentence.

Appeal against sentence.

Appellant was convicted at the Lichfield City Sessions, before the Recorder, on April 22nd, 1920, of housebreaking, and was sentenced to five years' penal servitude.

Appellant in person.

The LORD CHIEF JUSTICE: It is to be said in the appellant's favour that although he has been convicted a great number of times—there are twenty convictions against him during the last ten years—in the main during that period his convictions have been for minor offences and there is no indication of his reverting to serious crime. The Court thinks it right to take into account that he has not been convicted of any serious crime since 1908, and that for a number of years he has been working quite steadily, except for the minor offences referred to. The sentence will be reduced to eighteen months' imprisonment with hard labour.

Sentence reduced.

T. W. M.

1920
7 June.

Reading
L.C.J.
Shearman J.
Sankey J.

DAVID MORTON.

Appeal against conviction and sentence.

Appellant was convicted at the Leicester City Sessions, before the Recorder, on April 9th, 1920, of larceny, and was sentenced to three years' detention under the Borstal system.

Appellant in person.

F. Hinde for the Crown. Morton had already pleaded guilty on one indictment. He was then tried on another indictment and Crane was tried on a different indictment at the same time. The Court of Criminal Appeal held on May 17th, 1920, in *William Crane* (see preceding case) that there was no trial. But the two convictions were before the Recorder when he was passing sentence on the appellant. It is submitted that the sentence was clearly on both convictions, the one on which he pleaded guilty and on the one which is bad. He pleaded guilty to a very serious offence, and it is submitted that the sentence of three years' Borstal treatment is justified on the offence to which he has pleaded guilty.

The Lord Chief Justice: The appellant was charged in one indictment with the larceny of forty-eight glacé kid skins. He was tried and convicted. He also pleaded guilty to another indictment for stealing boots. He was sentenced for the two offences to three years' Borstal treatment.

With regard to the charge of stealing the skins we have already decided in the case of *William Crane* that there has been a mistrial. We have made an order in that case. We make a similar order in this case, the effect of which is that the conviction of stealing the glacé kid skins is quashed. The prosecution must decide whether they wish to proceed against him in respect of this indictment. The plea of guilty recorded in respect of the other indictment is right, and that conviction will stand. The sentence of three years under the Borstal system also stands.

Venire de novo *awarded*.

T. W. M.

ALBERT HINDLEY.

1920
7 *June.*

Reading
L.C.J.
Shearman J.
Sankey J.

Severity of consecutive sentences.

Appeal against sentence.

Appellant was convicted at the Liverpool Assizes, before Mr. Justice McCardie, on April 16th, 1920, of having carnal knowledge of girls under the age of 13 years, and was sentenced to nine years' penal servitude.

Appellant in person.

The Lord Chief Justice: The appellant was convicted on three counts charging him with having carnal knowledge of three girls under the age of 13 years, and was sentenced to three years' penal servitude under each count consecutively. There is power in the Court to inflict such a sentence. But it amounts to a sentence of nine years' penal servitude for the offences which were all committed at about the same time. The sentence will be reduced to five years' penal servitude.

Sentence reduced.

T. W. M.

HENRY GEORGE MOOR.

8 *June.*

The disagreement of the learned judge with a verdict is not a ground for quashing a conviction.

Perfect, 12 *Cr. App. R.*, 273, 1917, *affirmed.*

Appeal against conviction on certificate.

Appellant was convicted at the Central Criminal Court on May 18th, 1920, before Judge Atherley Jones, of obtaining money by false pretences, and was sentenced to six months' imprisonment in the second division.

The only legal point sufficiently appears in the judgment.

Curtis Bennett, K.C. and *Horace Fenton* for the appellant, who was present.

Percival Clarke for the Crown.

1920
8 *June.*

HENRY GEORGE MOOR.

Reading L.C.J.

THE LORD CHIEF JUSTICE: This appeal must be dismissed. There is no ground for impugning the verdict, though the learned judge apparently disagreed with it. It was held in *Elizabeth Perfect*, 12 Cr. App. R. 273: 1917, that, notwithstanding that the learned judge had given his certificate it was never intended that the Court should act on the opinion of the judge when the jury by their verdict had given a contrary opinion. In this case the matter was in the province of the jury and not of the judge. Indeed the jury were better judges of the facts than the judge.

The Court cannot say that the verdict ought to be set aside because the judge did not agree with it. The conviction must stand and the appeal must be dismissed.

Appeal dismissed.

Solicitor for the Appellant—*H. B. Judge.*

T. W. M.

The Court (The Lord Chief Justice, and Shearman and Sankey JJ.) also sat on June 14th.

BEFORE

MR. JUSTICE DARLING, MR. JUSTICE AVORY AND MR. JUSTICE ROWLATT.

ALBERT HARDING, JAMES JEFFREY AND HARRY JONES. 1920 21 *June.*

A judge has no power to refuse to try the allegation of being a habitual criminal.

Appeals against convictions and sentences.

Appellants were convicted at the Central Criminal Court, on May 21st, 1920, before Judge Atherley Jones, of shopbreaking, and Harding and Jones were each sentenced to three years' penal servitude, and Jeffrey to nine months' imprisonment with hard labour. Harding applied for leave to appeal against his sentence only.

Appellants were not present.

DARLING J., in dismissing the appeals, said: There is one matter in this case to which the Court desires to draw attention. The appellants Harding and Jones, and another man who has not appealed, were each charged in the indictment with being habitual criminals. It is the usual course to proceed with such allegations after the conviction for the particular offence in respect of which a prisoner is indicted. But in these cases the learned judge, when the prisoners were called on to plead to the allegations of being habitual criminals, and on their pleading not guilty, in each case said: "I shall not proceed with that." The effect is that these men are now liable to be tried for being habitual criminals. The allegations against them of being habitual criminals are still on the file.

It is not for a judge, when an indictment comes before him, to say without reason given that he will not proceed with it. If the prosecution offer no evidence on a particular indictment, a prisoner is ordinarily entitled to be acquitted. But here the only

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21 *June.*

ALBERT HARDING, JAMES JEFFREY AND HARRY JONES.

Darling J.

fact to be proved was that these men had already been convicted of being habitual criminals. Here they now remain neither convicted nor acquitted. What was done was that a kind of informal *nolle prosequi* was entered by the judge. But the judge has no power to enter a *nolle prosequi*, as was said, in unquotable language. to an importunate applicant by a Chief Justice of the King's Bench. The allegations of being habitual criminals remain on the file, and these men can still be tried on them. The appeals against both convictions and sentences must be dismissed.

Appeals dismissed.

T. W. M.

BEFORE

THE LORD CHIEF JUSTICE, MR. JUSTICE AVORY AND MR. JUSTICE SALTER.

JAMES PIGGOTT.

1920
28 *June.*

Observations on appeals to the Court from the single judge.

Appeal against conviction and sentence.

Appellant was convicted at the London Sessions, before the Chairman, on June 3rd, 1920, of false pretences, and was sentenced to 21 months' imprisonment with hard labour.

Appellant was not present.

THE LORD CHIEF JUSTICE, after dismissing the appeal, said: We notice in this Court that there is a tendency on the part of applicants who wish to appeal to this Court from the decision of a judge refusing leave to appeal, to send in a statement which is frequently a mere repetition of the statement that has been made to the judge, and considered by him. That practice is useless, because the statement made to the judge is already before the Court, and the only value of sending in a further statement is where there is additional matter or new matter which the applicant wishes to bring before the Court. This application must be dismissed.

1920
28 *June.*

Reading
L.C.J.
Avory J.
Salter J.

GEORGE COX.

The Court will only exceptionally allow a notice of abandonment of appeal to be withdrawn.

Application for leave to withdraw notice of abandonment.

Applicant was convicted at the London Sessions on May 13th, 1920, before the Deputy-Chairman, of burglary, and of being a habitual criminal, and was sentenced to three years' penal servitude and ten years' preventive detention.

Applicant was not present.

SALTER J.: The applicant gave notice of appeal against his sentence as a habitual criminal. On the following day he gave notice of abandonment of his appeal. By rule 23 of the Criminal Appeal Rules, "an appellant at any time after he has duly served notice of appeal, or of application for leave to appeal, or of application for extension of time within which under the Act such notices shall be given, may abandon his appeal by giving notice of abandonment thereof in the form (III.) in the schedule to these rules to the Registrar, and upon such notice being given, the appeal shall be deemed to have been dismissed by the Court of Appeal."

He now asks for leave to withdraw his notice of abandonment. He says that he gave the notice of abandonment to enable him to petition the Secretary of State with regard to the sentence, and he says that he thought that on dismissal of that petition he could renew his notice of appeal.

In *Sidney Pitman*, 12 Cr. App. R. 14: 1916, the Lord Chief Justice said: "The effect of the notice given by the applicant of his desire to abandon his appeal is, by rule 23 of the Criminal Appeal Rules, 1908, that his appeal must be deemed to have been dismissed by the Court. There is no doubt that this Court has power either to allow the notice of abandonment to be withdrawn, or to re-open an appeal which has been dismissed. But that power will only be exercised where there are special circumstances which in the view of the Court justify a departure from the ordinary procedure." Later on he says: "It must be borne

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28 *June.*

GEORGE COX.

Salter J.

in mind that precautions are taken to bring to the notice of every prisoner that he has a right to appeal against his conviction and sentence, and that he does not require money to enable him to do so. There can be no justification for an accused person abandoning his appeal unless he thinks that there is no ground upon which to appeal, and that it would be useless for him so to do."

In our view there is nothing in the circumstances of this case to justify us in departing from the ordinary procedure. The application must be refused.

Application refused.

T. W. M.

BEFORE

THE LORD CHIEF JUSTICE, MR. JUSTICE McCARDIE AND MR. JUSTICE SWIFT.

1920
12 *July.*

THOMAS WILLIAM TWYNHAM.

The Court has no power to extend the time for appealing against a conviction, in which sentence of death has been pronounced, nor against such sentence. When such sentence has been commuted by the Crown the Court cannot review it.

Application for extension of time to apply for leave to appeal against conviction and sentence.

Appellant was convicted at the Warwick Assizes on November 11th, 1912, before Mr. Justice Scrutton, of murder, and was sentenced to death. The sentence was subsequently commuted to penal servitude for life.

Applicant was not present.

THE LORD CHIEF JUSTICE: The appellant was convicted of murder in November, 1912, and sentenced to death. This sentence was commuted to penal servitude for life. Last month, he applied for extension of time to apply for leave to appeal against both conviction and sentence, and I directed that the application should be entered in the list, so that the matter might be dealt with in open court.

With regard to the conviction, s. 7, sub-s. (1) of the Criminal Appeal Act, 1907, provides that "where a person convicted desires to appeal under this Act to the Court of Criminal Appeal, or to obtain the leave of that Court to appeal, he shall give notice of appeal or notice of his application for leave to appeal in such manner as may be directed by rules of Court within ten days of the date of conviction. . . .

"Except in the case of a conviction involving sentence of death, the time within which notice of appeal or notice of an applica-

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12 *July*.

THOMAS WILLIAM TWYNHAM.

Reading L.C.J.

tion for leave to appeal may be given, may be extended at any time by the Court of Criminal Appeal."

It follows, therefore, that this Court has power to extend the time within which notice of appeal or notice of application for leave to appeal may be given, except in the case of a conviction involving sentence of death; and it equally follows that in the case of a conviction of murder and a sentence to death this Court has no power to extend the time. There is a very good reason for the Legislature making this provision, because the mere giving of a notice of appeal or a notice of application for leave to appeal against a conviction of murder or high treason, has the effect of postponing the date of the execution. Once that notice has been given, the execution cannot take place until a certain time after the hearing of the appeal. If it were possible to extend the time, it would be open to a murderer, having failed in one appeal, to give notice asking for an extension of time in order to bring some other matter before the Court, or not give the notice until the last moment, in order to provide for a further extension of time. Consequently, the Legislature deliberately declared that an appeal from a conviction involving a sentence of death must be made within the prescribed time. Therefore, this Court has no jurisdiction to extend the time for appealing or applying for leave to appeal against such a conviction.

With regard to the sentence, s. 3 of the Criminal Appeal Act provides that: "A person convicted on indictment may appeal under this Act to the Court of Criminal Appeal . . . .

"(*c*) with the leave of the Court of Criminal Appeal against the sentence passed on his conviction, unless the sentence is one fixed by law."

Now, on a conviction for murder, the sentence is one which is fixed by law. Therefore, here again, there is no right of appeal. It is further to be observed that the commutation of the sentence to penal servitude for life is not a sentence of law. It is the exercise of the prerogative of mercy which rests with the Sovereign. It was on the recommendation of the Home Secretary that the Sovereign commuted the sentence, and from that there can be no appeal, nor is there power to extend the time.

For the future, it must be taken as a direction of this Court that an application for an extension of time to apply for leave to appeal against a conviction of murder cannot be received after

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12 *July.*

THOMAS WILLIAM TWYNHAM.

Reading L.C.J

the time fixed by the section has elapsed. If such a case as the the present should ever arise again, the Registrar of the Court will hereafter, by the direction of the Court, refuse to receive the application or to insert it in the list.

Application refused.

T. W. M.

RICHARD OWEN ROBERTS.

Severity of sentence.

Appeal against sentence.

Appellant was convicted at the Ruthin Assizes, before Mr. Justice Coleridge, on June 8th, 1920, of shopbreaking, and was sentenced to six months' imprisonment with hard labour.

Appellant was not present.

The LORD CHIEF JUSTICE: We have taken into account the various matters now brought before us, especially the good character which was given to this young man by the police, and that this is really his first offence. The Court is of opinion that the sentence should be reduced. We bear in mind that he has been already detained in custody since his conviction. We reduce the sentence to one month's imprisonment, and order that he shall be released immediately.

Sentence reduced.

T. W. M.

The Court, consisting of the Lord Chief Justice, and Darling and Roche JJ., also sat on July 19th.

BEFORE

THE LORD CHIEF JUSTICE, MR. JUSTICE BRAY, AND MR. JUSTICE SANKEY

JAMES ELLOR.

1920
26 *July.*

Provocation by words, except, possibly in the case supposed in Rothwell, 1871, *cannot reduce murder to manslaughter.*

E. H. Palmer, Birchall *and* Greening, 1913, *followed.*

Application for leave to appeal against conviction.

Appellant was convicted at the Chester Assizes, on July 8th, 1920, before Lord Coleridge J., of murder, and was sentenced to death.

W. N. Stable, for the appellant (under s. 10, Criminal Appeal Act, 1907), who was present. Appellant was convicted of the murder of his wife. The application is for leave to appeal against that conviction on the ground of misdirection; and there is also an application for leave to call further evidence. The jury were not properly directed with regard to the question of provocation, and they were not told by the learned judge that there was evidence of provocation sufficient to justify a reduction of the charge from murder to manslaughter.

Appellant was married to his wife in 1907. In August, 1914, appellant joined the army, but was discharged on account of ill-health. He subsequently rejoined the army and served therein until March, 1919. Appellant's married life was not altogether a happy one, but until August, 1919, the relations between him and his wife were, on the whole, good. His wife left him on two occasions early in their married life, but was persuaded to return. After August, 1919, the relations between appellant and his wife became worse. In March, 1920, owing to appellant's violence his wife again left him. Appellant suspected his wife of being unfaithful to him, and this she knew. On the day before

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JAMES ELLOR.

Reading
L.C.J.
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Sankey J.

the murder, appellant observed to his stepson, who gave evidence at the trial, "I suppose she has gone to live with another man." There was, however, no evidence before the jury that appellant's suspicions were well founded. On the day of the murder—March 27th, 1920—appellant saw his wife at the house where she was living and tried to persuade her to return to him and bring the children back. He did not threaten. He went on his knees, and with tears in his eyes, implored her to return to him. The next thing known is that appellant, on the same day, gave himself up to the police and confessed that he had murdered his wife, and later on the same evening he made a written statement in which he said that he struck his wife with a hammer which he found lying on a ledge near the floor and that he wished it had not been there. He also said that at the interview referred to his wife told him to put his head under a train, and she also said that she was going to enjoy herself that night. In his written statement he says: "That did it." Appellant had suffered from gas poisoning, and, it is submitted, did not know what he was doing when he struck his wife. Moreover, it is submitted that where provocation arises from words and the jury think that because of such provocation an ordinary reasonable man would be deprived of his self-control, it is open to them to return a verdict of manslaughter instead of murder.

[The LORD CHIEF JUSTICE: If that is true, an angry word used may be sufficient to deprive a man of his self-control. The law of England has always been that that is not sufficient to reduce the charge from murder to manslaughter.]

Assuming that the jury believed appellant's statement, it was for them to decide. The learned judge was wrong in directing the jury that provocation by language alone would not justify the reduction of the charge from murder to manslaughter. It is clear on the evidence that appellant suspected his wife of being unfaithful, and had done so for some time. If appellant's account of the interview with his wife on the day of the murder was to be accepted, the meaning of what, according to appellant's account, his wife said, when he was imploring her to return to him, about putting his head under a train and that she was going to enjoy herself that night, was for the jury. But that question was with-

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Sankey J.

drawn from the jury. The words used by the wife meant, or might have meant, that she was about to commit misconduct, and they amount to such provocation as in law would entitle the jury to return a verdict of manslaughter instead of murder. The learned judge misdirected the jury in saying that there was no evidence on which they could reduce the charge to manslaughter.

In *Reg.* v. *Rothwell*, 12 Cox, C. C. 145: 1871, Blackburn J., said that "as a general rule of law, no provocation by words will reduce the crime of murder to that of manslaughter, but under special circumstances there may be such provocation of words as will have that effect; for instance, if a husband, suddenly hearing from his wife that she had committed adultery, and he having no idea of such a thing before, were thereupon to kill his wife, it might be manslaughter." That was followed by Bucknill J., in *Jones*, 72 J. P. 215: 1908.

Ralph Sutton, for the Crown, was not called upon.

The LORD CHIEF JUSTICE: The appellant was convicted of murder, and was sentenced to death. He appeals to this Court on the ground of misdirection. It appears that the appellant had some suspicion that his wife was unfaithful to him. On the evidence there is no ground for that suspicion. The only evidence given on the subject at the trial was that of the stepson, who proved that there was no ground for the appellant's suspicion of his wife's infidelity. The appeal is based on the appellant's statement that his wife told him to put his head under a train, and that she was going to enjoy herself that night. The whole basis of the case is that the words used by the appellant's wife meant, or might mean, that she was about to commit adultery. It is contended by counsel for appellant that the words amounted to such provocation as in law would entitle the jury to return a verdict of manslaughter instead of murder.

The question of law is one of some importance. Counsel for the appellant has contended that there are grounds for the proposition that if a wife told her husband that she was going to commit adultery and he then struck her a blow and killed her, it would be open to the jury to reduce the crime from murder to manslaughter. But no authority can be cited in support of such a proposition, and it is not the law of England. A statement by

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JAMES ELLOR.

Reading L.C.J.

the wife that she was going to live with another man, or that she was about to commit adultery, would not amount to provocation so as to reduce the crime of killing from murder to manslaughter. The authorities which have been cited support the contrary view. If a man discovers his wife in the act of adultery and kills the adulterer, the law regards the killing in such a case as manslaughter, because it regards the act of adultery as equivalent to a blow struck at the husband, that is to say, in its effect on his self-control. The principle has been extended to meet the case of a sudden confession by a wife that she has committed adultery, *Rothwell*, 12 Cox, C. C. 145: 1871, but all subsequent cases have treated that case as a special exception to the general rule of law, which is, that words cannot constitute sufficient provocation to justify the jury in reducing the crime from murder to manslaughter, except in very special circumstances. Channell J., in *Edward Henry Palmer*, 1913, 2 K. B. 29, 30; 82 L. J. K. B. 531; 8 Cr. App. R. 207; 108 L. T. 814; 77 J. P. 340; 29 T. L. R. 349, said: "We are of opinion that there was no misdirection . . . . The judge stated the rule in the old form, that words alone can never constitute sufficient provocation to reduce murder to manslaughter. It would, perhaps, have been more accurate in view of modern decisions if he had said that words cannot constitute sufficient provocation except in very special circumstances. . . . It is well-established law that if a husband discovers his wife in the act of adultery and thereupon kills her, he is guilty of manslaughter only and not of murder. That has been extended in *Rothwell* and *Jones* [both above], to a sudden confession by a wife of past adultery, an extension which no doubt creates an exception to the general rule that provocation by words is not enough." The language used by Blackburn J., in *Rothwell*, that "a man who discovers his wife in adultery and kills the adulterer is only guilty of manslaughter," was held in *Palmer's* case to have only a limited application, and the language in *William Harrison Birchall*, 9 Cr. App. R. 291; 29 T. L. R. 711: 1913, and *Frank Greening*, 1913, 3 K. B. 846; 83 L. J. K. B. 195; 109 L. T. Rep. 720; 29 T. L. R. 732; 9 Cr. App. R. 105, which came before the Court of Criminal Appeal in the same year as *Palmer's* case, it was held that the doctrine laid down by Blackburn J. in *Rothwell's* case should not be extended.

Therefore, on the authorities which were cited, there is nothing

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L.C.J.

to support the proposition which has been submitted, but, on the contrary, the reported decisions are against the wide extension of the doctrine contended for in this case. There is no ground for impugning the summing up of the learned judge or the verdict of the jury. Moreover, on the facts, there is no evidence to support the argument put forward by counsel for appellant. The whole argument has proceeded on the appellant's view of the meaning of the words used by his wife when she told him to go and put his head under a train and that she was going to enjoy herself that night. But in none of his confessions, nor at the trial, did the appellant say that he had killed the woman because he thought she was about to commit adultery. Indeed, in one confession he gave as his reason for killing the woman, her refusal to return to him. The appeal must be dismissed.

Appeal dismissed.

T. W. M.

SAM CLAYTON.

A bonâ fide *belief by the accused that he has a legal claim to property is a good defence to the charge of larceny thereof, and must be submitted to the jury.*

Appeal against conviction.

Appellant was convicted at the West Riding (Leeds) Sessions, before the Chairman, on June 28th, 1920, of larceny, and was sentenced to three months' imprisonment with hard labour.

C. P. Hawkes, for the appellant (under s. 10 of the Criminal Appeal Act, 1907), who was present. Appellant was charged with stealing 30*s.* from his wife who had obtained a separation order against him. Appellant took the money from his wife's purse, and as he was leaving the house he told his wife that he had taken the 30*s.* towards the 5*l.* which she owed him. He persisted throughout that he had a right to the money. Rightly or wrongly he had a *bonâ fide* belief that he had a right to the money. He was not defended at the trial. His wife denied that she owed him the 5*l.* and he did not go into the witness-box, and his defence was not put before the jury.

The LORD CHIEF JUSTICE: This conviction cannot stand and

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SAM CLAYTON.

Reading
L.C.J.

must be quashed. Appellant was convicted of stealing 30*s.* belonging to his wife. He has all the way through persisted that he had a right to the money. The appellant's claim to the 5*l.*, even though he might have no legal right to take the 30*s.*, ought to have been put to the jury by the Chairman as the defence. Whether he was right or wrong he had a *bonâ fide* belief that he had a right to the money. Therefore the appeal must be allowed.

Conviction quashed.

T. W. M.

WILLIAM GILLIGAN.

Severity of sentence.

Appeal against sentence.

Appellant was convicted at the Cheshire (Knutsford) Sessions, on June 30th, 1920, before the Chairman, of larceny, and was sentenced to five years' penal servitude.

Appellant was not present.

SANKEY J.: The appellant was convicted of stealing clothing from outside a shop. He was jointly indicted with a man named Jackson and both were found guilty. His companion, Jackson, was sentenced to six months' hard labour. The reason for the difference in the sentences was that Gilligan had a very bad record. It is perfectly true that he has had two terms of penal servitude; the last in 1913, when he was sentenced to three years' penal servitude for stealing an overcoat. After he came out he went into the army and served there for three years. We have come to the conclusion that the difference in the sentences passed on these two men was too great, notwithstanding appellant's previous bad record. Bearing in mind that his present offence was of a minor character, we reduce his sentence to twelve months' imprisonment with hard labour.

Sentence reduced.

T. W. M.

BEFORE

THE LORD CHIEF JUSTICE, MR. JUSTICE BRAY AND MR. JUSTICE SANKEY.

1920
27 *July.*

MAX APPLETON.

Severity of sentence in the case of an alien.

Appeal against sentence.

Appellant was convicted at the Bradford Sessions, on July 3rd, 1920, before the Recorder, of receiving stolen property, and was sentenced to six months' imprisonment with hard labour and recommended for expulsion.

Maddocks, K.C., and *Murray-Smith* for the appellant, who was not present. The Court is asked to cancel the recommendation for expulsion. Appellant is 24 years of age. He came to this country from Poland when he was about 11 years of age. *Sidney Friedman*, 10 Cr. App. R. 72: 1914, and *Shaffner*, 14 Cr. App. R. 131: 1919, were referred to.

The LORD CHIEF JUSTICE: The appellant was convicted of receiving stolen goods, and was sentenced to sixteen months' imprisonment with hard labour and recommended for expulsion. He applies for leave to appeal against the sentence. No argument has been addressed to us with regard to the sentence of imprisonment, and rightly so, because the Court could not interfere with that part of the sentence. With regard to the sentence of expulsion, we have come to the conclusion that that part should be quashed. We have communicated with the Director of Public Prosecutions, who does not wish to appear to oppose the quashing of that part of the sentence, and consequently we quash that part of it. The sentence will date from the conviction.

Recommendation for expulsion quashed.

T. W. M.

Solicitors for Appellant—*Hamlins, Grammer and Hamlin.*

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Reading
L.C.J.
Bray J.
Sankey J.

WILLIAM BALDOCK AND GEORGE DAVIS.

Severity of sentence in the case of previously unconvicted persons.

Appeals against sentence.

Appellants were convicted at Essex Sessions, before the Chairman, on June 30th, 1920, of being in possession of housebreaking implements by night, and were each sentenced to twelve months' imprisonment with hard labour.

Appellants in person.

The LORD CHIEF JUSTICE: It is to be observed that neither of these young men has been previously convicted, but there is, unfortunately, some evidence that they have been concerned in another crime. We have, however, come to the conclusion—bearing in mind that these two young men have not been previously convicted—that it would be better to deal mercifully with them, and in the hope that they will abandon crime and try to lead honest lives we reduce the sentences to three months' imprisonment with hard labour in each case.

Sentences reduced.

T. W. M.

HERBERT CUTTS.

Reduction of sentence for bigamy on the ground of the circumstances of the conviction being exceptional.

Appeal against sentence.

Appellant was convicted at the Manchester Assizes, before Mr. Justice Acton, on July 2nd, 1920, of bigamy, and was sentenced to eight months' imprisonment.

Appellant in person.

SANKEY J.: In ordinary circumstances the crime of bigamy is a very serious one, and deserves severe punishment. But the facts

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HERBERT CUTTS.

Sankey J.

of this case are of a very exceptional character. Appellant was married in April, 1904, and in the following year, namely, April, 1905, his wife obtained an order for maintenance against him. On the 11th of September, 1909, he went through a form of marriage with another woman. He gave his name as Herbert Watson, and it was for that bigamous marriage, an offence which took place about eleven years ago, that he is now prosecuted. There is no doubt that it did take place, but the appellant says that proceedings were taken against him in respect of that offence in February, 1910, in Salford. He was charged with the offence when he was being sued for maintenance by his first wife. The difficulty is that in the present case he has pleaded guilty, although the offence took place a very long time ago. There seems some ground for saying that he was charged in February, 1910. We have now ascertained some further facts which were not before the learned judge who sentenced the appellant. He had been in prison a fortnight before the trial on July 2nd, and also since the trial. Having regard to the further facts which are before us, and the very exceptional circumstances of the case, we have decided to pass a reduced sentence which will expire to-day. Accordingly, in the unique circumstances, the appeal will be allowed and the appellant will be discharged.

Sentence reduced.

T. W. M.

BIBL. LONDIN UNIV.

BEFORE

THE LORD CHIEF JUSTICE, MR. JUSTICE SALTER AND MR. JUSTICE ACTON.

1920
30 *July*.

ANNIE LOVEGROVE.

Evidence in corroboration of an accomplice is not inadmissible merely because it alleges against defendant a crime other than that charged.

Appeal against conviction.

Appellant was convicted at Lewes Assizes, before Mr. Justice Roche, on July 9th, 1920, of manslaughter and of using an instrument to procure abortion, and was sentenced to eighteen months' imprisonment with hard labour.

Charles Doughty (with him, *F. W. Gentle*) for the appellant, who was not present. She was charged with manslaughter and also with using certain instruments or other means to procure miscarriage. Evidence was wrongly admitted that appellant had previously performed an illegal operation on another woman, a Mrs. Type, who gave evidence for the prosecution. That evidence was inadmissible. The defence was that the deceased woman never went to appellant's house at all. It was admitted that the deceased woman's husband came to appellant's house to inquire about apartments on the morning of June 18th, but appellant's case was that she never saw the deceased woman at all, nor her husband after that morning visit. There was no question of intention, or accident, or design, such as there was in *Bond*, 1906, 2 K. B. 389; 75 L. J. K. B. 693; 95 L. T. 296; 70 J. P. 424; 21 Cox C. C. 252; 22 T. L. R. 633. The evidence of the previous offence was wholly disconnected with the present charge.

[SALTER J.: This is a considerable advance on *Bond*.]

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ANNIE LOVEGROVE.

Reading L.C.J.
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There is no difference in principle between this case and *Bond*, but there is a difference in degree. This is a great advance on *Bond*. Evidence with regard to the state of mind of the witness was not admissible. There was here no suggestion of intention, design, system, or course of conduct.

[ACTON J. referred to the three classes mentioned by Bray J. where such evidence is admissible. *Bond*, 1906, 2 K. B. at p. 414, where he says: "A careful examination of the cases where evidence of this kind has been admitted shows that they may be grouped under three heads: (1) where the prosecution seeks to prove a system or course of conduct; (2) where the prosecution seeks to rebut a suggestion on the part of the prisoner of accident or mistake; (3) where the prosecution seeks to prove knowledge by the prisoner of some fact."]

In that case Bray J. said, at p. 418; 95 L. T. at p. 305, "But I do not think that the proof of but one similar case, without any special connection with the case charged in the indictment, would prove, or indeed would be evidence of, such a system. Of course, it may be said that if two cases will not do, how many will? But this is a difficulty which always arises in such cases. To prove that a man was twice drunk and nothing more will not prove that he is an habitual drunkard. I think, when evidence of this class is tendered, the judge should require an assurance from the counsel for the prosecution that in his opinion he has evidence of a sufficient number of cases to prove a system."

J. G. Hurst, *K.C.*, and *John Flowers* for the respondent. It is clear that all evidence must be relevant to the issue to be decided. This evidence went to establish a relevant issue, and it was properly admitted. In *Ball*, 1911, A. C. 47; 6 Cr. App. R. 31; 80 L. J. K. B. 691; 103 L. T. 738; 75 J. P. 180; 22 Cox C. C. 366; 55 S. J. 139; 27 T. L. R. 162: 1910, a case of incest, the House of Lords held that evidence of previous acts of defendants given with a view of showing what were the relations between them was admissible on the issue; for the object of that evidence was to establish that defendants had a guilty passion towards each other, and to rebut the defence of innocent association as brother and sister.

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In *Shellaker*, 1914, 1 K. B. 414; 83 L. J. K. B. 413; 110 L. T. 351; 78 J. P. 159; 24 Cox C. C. 86; 30 T. L. R. 194; 9 Cr. App. R. 240:1913, the accused was indicted for unlawfully and carnally knowing a girl under the age of sixteen within six months of the commencement of the prosecution. Evidence was admitted of previous acts and conduct of the accused which tended to prove that he had had connection with the girl more than six months before the commencement of the prosecution. It was held that the evidence was admissible to prove the offence with which the prisoner was charged, although it might prove a previous offence for which he could not be prosecuted.

Doughty replied.

The LORD CHIEF JUSTICE: The appellant was convicted on an indictment which charged her with the manslaughter of Edith Purcell, and was sentenced to eighteen months' imprisonment with hard labour. Counsel for the appellant has afforded us great assistance in presenting the case to us. Two points are raised, (1) that the evidence of Mrs. Type was not admissible, and that the wrongful admission of that evidence entitles the appellant to have her conviction quashed, and (2) that there was no corroboration of the testimony of the husband of the deceased woman.

Purcell had discovered that his wife was with child. He met Mrs. Type and had a conversation with her. On the morning of the 18th of June he and his wife went to appellant's house. Purcell in his evidence said that he asked her, "Have you brought about miscarriages even after five months?" She said, "Yes, I have, but it is very dangerous after four months." The appellant, in her evidence, describing the conversation which took place on the morning of the 18th of June, said: "The bell rang and I answered the door, and the man, whom I now know as Purcell, asked me whether I had a bed-sitting-room to let. I said: 'No, I had not; I am doing board residence now.' He hesitated a bit and he said: 'What are your terms?' I said: 'Two-and-a-half guineas per week.' He said: 'Oh, I will think about it. Are you Mrs. Lovegrove?' I said: 'Yes.' He said: 'Mrs. Type sent me.' I said: 'Oh.' He said: 'I will bring my wife along.' That is the evidence with regard to the conversation in the morning. It was contended that the conversation referred to the price of

rooms, and that no question arose about the procuring of the miscarriage. The defence was there had been in fact no operation, lawful or unlawful, done by the appellant, and that in truth, after that interview, she had never seen Purcell or his wife. That was a definite denial of Purcell's story.

The evidence of Mrs. Type was admissible if it was testimony going a step to prove the object of the visit to the appellant's house on the morning of the 18th of June, and that Purcell came and stated his object, which was to ascertain whether the appellant would perform an operation to bring about miscarriage. The evidence of Mrs. Type established that Purcell had spoken to Mrs. Type about his wife, and that she, Mrs. Type, had a conversation with him and had given him the appellant's address.

It is contended that the evidence of Mrs. Type relating to the operation previously performed by the appellant on her is inadmissible on the general principles of *Makin* v. *Att.-Gen. for New South Wales*, 1894, A. C. 57; 63 L. J. P. C. 41; 69 L. T. 478; 17 Cox C. C. 704; 58 J. P. 148, and *Bond's* case (above), and similar cases. We, in this case, are not intending to deal in any way with the general principles of those cases. We are not intending to extend or restrict the principles laid down therein.

In *Makin's* case, 1894, A. C. at p. 65, Lord Herschell said: "The mere fact that the evidence adduced tends to show the commission of other crimes does not render it inadmissible if it be relevant to an issue before the jury, and it may be so relevant if it bears upon the question whether the act alleged to constitute the crime charged in the indictment was designed or accidental, or to rebut a defence which would otherwise be open to the accused. The statement of these general principles is easy, but it is obvious that it may often be very difficult to draw the line and to decide whether a particular piece of evidence is on the one side or the other."

This Court has said in *Shellaker's* case (above), after referring to *Ollis*, 1900, 2 Q. B. 758: "It is quite easy to put cases where the application of this principle might cause hardship to the prisoner; but such cases might come within the class in which, though in strictness the evidence is admissible, the judge may be of opinion that it is of little real value, and yet indirectly so prejudicial to the prisoner, or that it is so remote, that it ought

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ANNIE LOVEGROVE.

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not to be given. That, however, does not affect the general principle."

It is only right to say that our Courts are very jealous in extending the law of evidence. In the present case we do not extend or restrict the general principle as laid down in the cases referred to.

The evidence here tends to prove that the testimony of Purcell that he asked the appellant whether she had brought about miscarriages even up to after five months, and that she said yes, but that it was very dangerous after five months, was in fact true. It tends to establish that the conversation as stated by Purcell did in fact take place. It is therefore admissible on that ground. Once we have come to the conclusion that the evidence was admissible in law, it follows that the appeal cannot succeed on this ground.

It is also said that there was no corroboration of the evidence of Purcell, the accomplice. We cannot agree with that contention. This case depends on its peculiar facts, and the conviction must stand.

Appeal dismissed.

Solicitors for the Appellant—*Sawyer and Withall*, Agents for *J. C. Buckwell*, Brighton.

Solicitors for the Prosecution—*Nye, Moreton and Clowes*, Agents for *J. K. Nye and Donne*, Brighton.

T. W. M.

ROBERT HARTLEY.

Severity of sentence.

Appeal against sentence.

Appellant was convicted at the Bolton Sessions, before the Recorder, on July 8th, 1920, of larceny, by a trick, of two shillings and nine pence, and was sentenced to twelve months' imprisonment with hard labour.

Appellant in person.

The Court reduced the sentence to six months' imprisonment with hard labour, in view of the youth of appellant (he being

twenty-one years of age) and of the trivial nature of the offence (though he had been convicted previously three times for small larcenies).

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30 *July.*

Reading
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Sentence reduced.

T. W. M.

VIOLET JOHNSON.

Severity of sentence.

Appeal against sentence.

Appellant was convicted at the Central Criminal Court, before the Recorder, on June 22nd, 1920, of obtaining by false pretences, and was sentenced to fifteen months' imprisonment with hard labour.

Burgess for the appellant (under s. 10 of the Criminal Appeal Act, 1907), who was not present. The appellant has been living with a man named John Grove Johnson, who, although he had ample means, made a practice of swindling tradespeople, and was at the same sessions convicted and sentenced to three years' penal servitude. Appellant was under the man's influence.

SALTER J.: The appellant was undoubtedly under the man's influence, and if she had been his wife that would have been a good defence to the charge. But, living with him only, she stood on a different footing. The Court, however, is of opinion that a sentence of nine months' imprisonment in the second division is sufficient, and the sentence is accordingly reduced.

Sentence reduced.

T. W. M.

BEFORE

THE LORD CHIEF JUSTICE, MR. JUSTICE ROCHE AND MR. JUSTICE SWIFT.

1920
25 *August.*

HENRY PIKE.

Severity of sentence.

Appeal against sentence.

Appellant was convicted at the Liverpool City Sessions, before the Deputy-Recorder, on July 28th, 1920, of an attempt to obtain by false pretences, and sentenced to six months' imprisonment with hard labour.

Appellant was not present.

The LORD CHIEF JUSTICE: Having regard to certain facts now before us, which were not before the Deputy-Recorder, we think the sentence should be reduced to one month's imprisonment.

Sentence reduced.

T. W. M.

BEFORE

THE LORD CHIEF JUSTICE, MR. JUSTICE DARLING AND MR. JUSTICE ACTON.

EDWARD ERNEST WESTFALL.

1920
18 *October*.

Habitual Criminal.

The statutory notice to the accused, alleging that he is "a professional pickpocket," is good (though it would be better expressed more specifically) and is properly supported by evidence that he has been associating with persistent pickpockets.

The appellant was tried on September 28th, 1920, before the Deputy-Chairman of the County of London Sessions, and pleaded guilty to stealing a purse from the person. He was also charged with being a habitual criminal, to which he pleaded "Not guilty." He was convicted, and was sentenced to three years 'penal servitude and five years' preventive detention.

The appellant appealed against his conviction as a habitual criminal on the ground that evidence was admitted in support of the charge that he was leading persistently a dishonest and criminal life which was not covered by the notice given to him under s. 10, sub-s. 4 of the Prevention of Crime Act, 1908, setting forth the grounds on which the charge was founded. One ground alleged (*inter alia*) was "(5) That you are a professional pickpocket."

I. G. Kelly for the appellant (under s. 10 of the Criminal Appeal Act), who was present. The evidence complained of was that of detectives, to the effect that since his last release from prison in July, 1920, appellant had been seen in the company of a very dangerous gang of persistent pickpockets. The above ground does not cover this evidence. When it is intended to give evidence of

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EDWARD ERNEST WESTFALL.

Reading L.C.J. Darling J. Acton J.

this character, the kind of form the notice of it should take has been determined in *Turner*, 1 K. B. 361; 79 L. J. K. B. 183; 3 Cr. App. R. 161: 1910. This notice would not convey to appellant's mind that this sort of evidence was to be given; he would think that it related to his previous convictions. The notice ought to make him clearly understand the nature of the evidence to be given against him. The charge of being a "professional" pickpocket would to him only refer to the frequency of his convictions for that offence.

Maxfield, 7 Cr. App. R. 230, 1912, and *Neilson*, 9 Cr App. R. 218, 1913, were also referred to.

F. Watt for the Crown was not called upon.

The LORD CHIEF JUSTICE: We have had the advantage of a very carefully considered and very able argument by appellant's counsel. The appellant after he had pleaded guilty to stealing a purse was found guilty of being a habitual criminal. The evidence on the charge of being a habitual criminal was beyond discussion. He had been convicted twenty-one times, mostly of picking pockets, although it is true that thirteen of the convictions were for being a suspected person.

The first point, and as it appears to us the most substantial point raised, is that there was in the notice given to appellant under the Act no statement that among the grounds to be charged against him in support of the allegation of being a habitual criminal was that he was an associate of pickpockets, thieves and criminals. The notice was "That you are a professional pickpocket." Some notice must be given directing attention to the fact, so as to allow evidence of evil repute to be given, the point being that the Crown should establish that the accused is leading persistently a dishonest and criminal life. These words have been much discussed in this Court. It is not sufficient to prove that some years ago appellant has been leading such a life, because the Act says that it must be established that he *is* leading such a life. One way of establishing that fact is to show that at the time when he committed the crime of which he has been convicted he was an associate of thieves and criminals. Evidence of repute can be given for that purpose. The real point in this case is whether ground

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(5) of the notice is sufficient notice to indicate to appellant that evidence will be given against him that he is an associate of pickpockets. No doubt it would be better in all these cases to state in terms that the charge intended is that of being an associate of criminals; but in our judgment this notice was sufficient to indicate to the appellant the class of evidence it was intended to give. To prove that he was a professional pickpocket such evidence as this would be admissible, namely, that he was in the habit of consorting with pickpockets and thieves. We think, therefore, that no injustice has been done, and that this evidence was properly admitted, though, as I have said, it is desirable to give more specific notice.

Appeal dismissed.

W. L. L. B.

GEORGE TUSSLER.

Mitigation of sentence in view of old age.

Appeal against sentence.

Appellant, a man of 73 years of age, was sentenced at the Hampshire Quarter Sessions on January 6th to seven years' penal servitude for larceny.

No counsel appeared.

Appellant was present.

The LORD CHIEF JUSTICE: The appellant was indicted for stealing six 1*l*. notes, and certain small articles, chiefly clothing. He pleaded guilty to stealing the latter, but not guilty to stealing the money, and he has not been found guilty of stealing the money. He is a man of 73 years of age. He admitted that he broke into a caravan and took the clothes mentioned. He has been convicted on a number of occasions, altogether nineteen times, and has served three terms of penal servitude. All these facts, no doubt, were in the mind of the Chairman, but we think, that notwithstanding that, some regard must be paid to the appellant's age, and

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GEORGE TUSSLER.

Reading L.C.J.

also to the nature of the crime charged. In the circumstances we have come to the conclusion that a sentence of seven years' penal servitude on a man of 73 years of age is too severe. We think eighteen months' imprisonment the proper sentence, and we reduce the sentence accordingly.

Sentence reduced.

W. L. L. B.

BEFORE

THE LORD CHIEF JUSTICE, MR. JUSTICE DARLING AND MR. JUSTICE SALTER.

DAISY IRVING.

1920
25 *October.*

Recommendation of expulsion set aside.

Appeal against conviction and sentence.

Appellant, who was present, was convicted on 23rd September, 1920, at London County Sessions, and sentenced by the Chairman to three months' imprisonment with hard labour for larceny from a dwelling-house, and recommended for expulsion.

No counsel appeared.

The LORD CHIEF JUSTICE (*to Appellant*): Do you desire to add anything to your written statement which we have considered?

Appellant: I think that having served twelve months for a later offence I should not have been sentenced for an earlier offence.

Mr. JUSTICE DARLING: The appellant was convicted for an offence which was committed before another offence, for which she was sentenced by me at the Kent Assizes in June, 1919, to twelve months' imprisonment with hard labour for stealing a piano. That was a very curious case, because the appellant then declined to defend herself; she simply stood absolutely silent. That silence is now explained. She was afraid of being charged with the theft of the furs which brought her the present sentence of three months' imprisonment with hard labour. The Court will not interfere with that part of the sentence, but the recommendation to be deported from this country is a very serious matter. I think that the appellant is a German, and however undesirable a person may be, to be sent back to Germany with that country in

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DAISY IRVING.

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its present state would be a terrible aggravation of the sentence. I should not myself, at Kent Assizes, have recommended her for deportation, and the Court has come to the conclusion that it is not advisable that she should be deported. The sentence of three months' imprisonment with hard labour must stand, but the Court allows the appeal against the recommendation for deportation.

Recommendation of expulsion set aside.

E. A.

HENRY SCRAGG.

Sentence mitigated in view of meritorious military service and a period of honest work.

Appeal against sentence.

Appellant was convicted on the 7th September, 1920, at the Stoke-on-Trent Sessions, before the Recorder, for house-breaking, and was sentenced to four years' penal servitude.

Appellant was not present, and no counsel appeared on either side.

The LORD CHIEF JUSTICE: The facts of this case are not in dispute. The only question is about sentence. The appellant is forty-two years of age. He has had sixteen previous convictions, and has served three terms of penal servitude. He was released from prison in 1915, and forthwith joined the army, in which he served with credit for three years and a half, and was wounded in action, receiving a good character on demobilisation in 1919. He then worked for a builder from June, 1919, and his employer gives him a good character. It is clear that the loss of employment was due to some domestic difference, and not to inefficiency as a workman. He only left his employment when his wife created a disturbance there. Having lost his work, appellant reverted to his former criminal habits. Bearing in mind his good army record, and that after demobilisation he tried to discharge his duties well and earn an honest living, we are of opinion that attention should be directed to any attempt made by a man to reform. Although

this man's record justified a sentence of penal servitude, the period which has elapsed since the last convictions should be considered. The sentence, in our view, is too severe, and therefore it will be reduced to one of eighteen months' imprisonment with hard labour.

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25 *October.*

HENRY SCRAGG.

Reading L.C.J.

Sentence reduced.

E. A.

ALEXANDER CECIL SCHIFF.

1 *November.*

The Court will not quash a conviction merely because there has not been a specific direction to the jury that the evidence of a child who is not sworn under s. 30 *of the Children Act,* 1908, 8 *Ed.* 7, *c.* 67, *must be corroborated—if, in fact, there has been corroboration. But such a direction should be given.* E. Murray, 9 *Cr. A. R.* 248, 1913, *followed.*

Appellant was convicted on the 27th September, 1920, at the Middlesex Sessions, before the Deputy-Chairman, on an indictment charging him in three separate counts with indecent assault upon each of three sisters, one of whom was eight years of age. She gave evidence without being sworn. Sentence was postponed.

The principal ground of appeal was that the learned Deputy-Chairman misdirected the jury by omitting altogether to direct them in accordance with the provisions of s. 30 (a) of the Children Act, 1908.

J. G. Hurst, K.C. (with him *E. J. Purchase*) for the appellant, who was present, admitted that there was evidence corroborating the child's story generally, but submitted that this corroborative evidence did not implicate the accused: it was not "other material evidence in support thereof implicating the accused."

[The LORD CHIEF JUSTICE pointed out that when coupled with facts that the child had been in the appellant's company at the material time it was difficult to say that the corroborative evidence did not sufficiently implicate the accused.]

Hawkin for the Crown was not called upon.

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1 *November.*

ALEXANDER CECIL SCHIFF.

Reading L.C.J.

The LORD CHIEF JUSTICE: The appellant was charged on an indictment containing three counts charging him with indecent assault on three young girls. For the purpose of this appeal the most important question is the one which has been raised on the third count in the indictment, which relates to a girl of tender years who gave evidence without being sworn. Her evidence was received in accordance with the provisions of s. 30 of the Children Act, 1908, as amended by the Criminal Justice Administration Act, 1914. It has been argued before us that though there was some corroboration of the child's evidence, it did not implicate the accused, and was therefore inadmissible under the terms of the statute referred to. This question has already been dealt with by this Court in a considered judgment in the case of *Baskerville*, 2 K. B. 658; 86 L. J. K. B. 28; 12 Cr. App. R. 81: 1916, and as it was pointed out during the course of the argument, it is difficult to see how the evidence in the present case, if it was believed by the jury, does not tend to implicate the accused man. It is hardly possible that the child could have invented the details of the story which she told in the witness box, and the Court considers that there was sufficient corroborative evidence in the case.

It has also been contended that the learned Deputy-Chairman misdirected the jury by not warning them about the necessity for the requisite corroboration in the case of a child of tender years, and we have been referred to the case of *William Davies*, 25 Cox, C. C. 225; 85 L. J. K. B. 208; 11 Cr. App. R. 272: 1915 (*a*). It is sufficient to say that although no specific direction was given by the judge on the necessity for corroboration, yet the matter was repeatedly dealt with in the summing-up, and it must be borne in mind that counsel for the accused, in his address to the jury, had put this point prominently before them, and that his observations had been referred to by the judge. We are of opinion that the conviction was right, and the appeal will therefore be dismissed.

Appeal dismissed.

Solicitor for the Appellant—*A. W. Fryzer.*

R. B.

(*a*) Cf. *E. Murray*, 30 T. L. R. 196; 9 Cr. App. R. 248: 1913.

BEFORE

THE LORD CHIEF JUSTICE, MR. JUSTICE DARLING AND MR. JUSTICE BRAY.

GEORGE ROBERTS, OTHERWISE SPALDING.

1920
4 *November.*

A suggestion that the prosecution is due to a desire for revenge is an "imputation" within s. 1 (*f*) (*ii*) *of the Criminal Evidence Act.*

Appeal against a conviction for larceny and receiving, followed by a sentence of six months' hard labour, before the Recorder of Bristol Quarter Sessions, on October 5th.

The appellant was charged upon an indictment for stealing, on the 21st August, 1920, three yards of dress material, the property of William Rolfe, and for receiving the same knowing it to have been stolen.

H. J. Barclay for the appellant (under s. 10 of the Criminal Appeal Act), who was present. I ask for leave to add another ground of appeal, viz. misdirection by the learned Recorder, as at the time of sending in the notice of appeal the shorthand notes were not available. (The Court granted leave.) Appellant in this case was living at the time of the alleged offence with a Mrs. Jones, a married woman living apart from her husband, and had two children by her. On the 21st August, according to appellant's story, he wanted some money in order to go and visit one of his children, who was ill with scarlet fever and diphtheria at Pill. He asked Mrs. Jones for some money, but she could not give him any. She told him to pawn some things and get the money for the journey in that way. Appellant then took out of a drawer certain articles, including the dress material belonging to a Mrs. Rolfe, which forms the subject of the present charge. He pawned these articles for the sum of half-a-crown,

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4 *November.*

GEORGE ROBERTS, OTHERWISE SPALDING.

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and went to see his sick child. When returning home he met Mrs. Jones and producing a knife, which he had found in the house before leaving, asked whose knife it was. Mrs. Jones refused to say, and an altercation ensued. Appellant was said to have threatened Mrs. Jones with the knife, and she said she would give him in charge for doing so. Subsequently Mrs. Jones told Mrs. Rolfe that the dress material had been taken by appellant. It was alleged by the prosecution that appellant knew at the time of taking the dress material that it belonged to Mrs. Rolfe. Appellant admitted that he took it to the pawnbrokers, but alleged that he did so on Mrs. Jones' account, and when interviewed by Mrs. Rolfe he offered her half-a-crown as the value of the material. He was subsequently arrested and charged with the larceny of the dress material and also with failing to report himself to the police. He pleaded guilty to the second charge and not guilty to the charge of larceny. At the trial Mrs. Jones was cross-examined at some length with a view of showing that the prosecution was instituted by malice on her part, and appellant in giving evidence on his own behalf said that Mrs. Jones declared that she was going to have her revenge and have him arrested for stealing the dress material. Counsel for the prosecution then proposed to put certain questions to appellant regarding his past career and obtained from him answers showing that he had been previously convicted of various crimes. After counsel had addressed the Court, and the learned Recorder had summed up the case, the jury retired. They were absent for nearly two hours and returned a verdict to the effect that appellant was guilty of taking the cloth but that he was not aware that it belonged to Mrs. Rolfe. The jury were then requested to reconsider their verdict, and after a further explanation by the Recorder they ultimately returned a verdict of guilty.

My submission to the Court is that evidence of these previous convictions was wrongfully admitted. The nature and conduct of the defence was not such as to involve imputations on the character of the prosecutrix or her witnesses, and the case comes within the decision in *Preston*, 1909, 1 K. B. 568; 73 J. P. 173; 78 L. J. 335; 25 T. L. R. 280; 2 Cr. App. R. 20.

[BRAY J.: Do you say that the attack on the woman's motive was not part of the defence?]

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4 *November.*

GEORGE ROBERTS, OTHERWISE SPALDING.

Reading L.C.J. Darling J. Bray J.

The circumstances of this case were peculiar. Appellant had been living with Mrs. Jones on and off for ten years, and the charge of theft was made and the prosecution was started immediately after he had pawned the articles. I may refer the Court to *Bridgwater*, 1905, 1 K. B. 131; 69 J. P. 26; 91 L. T. 838; 21 T. L. R. 69; 20 Cox C. C. 337; and *Westfall*, 76 J. P. 336; 107 L. T. 463; 28 T. L. R. 297; 7 Cr. App. R. 176, 1912. In the present case there was no attack on the character of the prosecutrix. It was essential that the appellant should be able to clear himself of the charge brought against him, and he could only do this by showing that it was a trumped-up charge. The meaning of the words in s. 1 (f) (ii) of the Criminal Evidence Act, 1898, is explained fully in *Hudson*, 1912, 2 K. B. 465; 7 Cr. App. 256; 81 L. J. 861; 23 Cox 61. The evidence against appellant was meagre and unsatisfactory, and the second verdict of the jury was practically asked for. There was no evidence of an intention to steal, and the verdict should not be allowed to stand.

DARLING J.: The appellant in this case was tried before the Recorder of Bristol Quarter Sessions. He was charged on two indictments, the first charging him with the theft of certain dress material and the second with failing to report himself to the police. He pleaded guilty to the latter charge and not guilty to the charge of theft. The appeal is based on three grounds, which may be shortly stated: (1) that in order to clear himself the appellant set up the defence that the prosecution was started out of revenge, and that this being held to be an imputation on the character of a witness for the prosecution cross-examination on previous convictions was wrongfully allowed; (2) that the appellant was entitled to the benefit of the first verdict returned by the jury, which amounted to an acquittal; (3) that there was no intention to steal, and that the prosecution had failed to establish the charge of larceny. With regard to the last two points it was clearly not necessary that the appellant in taking the property should know exactly to whom it belonged, and there is no ground for the contention that the appellant did not intend to deprive the owner permanently of her property. On both these points, therefore, the appeal fails. With regard to the first ground of appeal the question raised turns upon the wording of s. 1 (f) (ii)

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4 *November.*

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of the Criminal Evidence Act, 1898, and objection is taken on behalf of the appellant that he was improperly cross-examined on previous convictions. The defence set up at the trial was an absolute denial of the story told by the witnesses for the prosecution, and the appellant further alleged that there had been a quarrel between himself and Mrs. Jones, the woman with whom he lived, about a knife which was found in their house, and that in consequence the prosecution was started by way of revenge. The following passage from the judgment of Channell J. in the case of *Preston*, 1909, 1 K. B. at p. 575, is very material on this point: "If the defence is so conducted, or the nature of the defence is such, as to involve the proposition that the jury ought not to believe the prosecutor or one of the witnesses for the prosecution upon the ground that his conduct—not his evidence in the case, but his conduct outside the evidence given by him—makes him an unreliable witness, then the jury ought also to know the character of the prisoner who either gives that evidence or makes that charge . . . it then becomes admissible to cross-examine the prisoner on his antecedents and character with the view of showing that he has such a bad character that the jury ought not to rely upon his evidence. That is the general nature of the enactment and the general principle underlying it." In the case of *Westfall* both *Preston's* case and the case of *Bridgwater*, to which we have been referred, are quoted with approval by Hamilton J. In the present case we cannot say that no imputation was cast upon the character of the principal witness for the prosecution, and in the opinion of the Court this ground of appeal also fails. No fault can be found with the direction of the learned Recorder.

Appeal dismissed.

R. F. B.

BEFORE

THE LORD CHIEF JUSTICE, MR. JUSTICE DARLING AND MR. JUSTICE SALTER.

CHARLES HUNTER.

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The allegation of being a habitual criminal within s. 10 (4) *of the Prevention of Crime Act,* 1908, *must be tried by the jury which convicted of the primary charge.*

Appeal against conviction and sentence.

Appellant was indicted for office-breaking and larceny, at the County of London Sessions, and also as a habitual criminal. The jury convicted him on the primary charge on August 27th. Before the charge of being a habitual criminal was dealt with, appellant said he wanted to call a witness to prove honest employment, and accordingly the Deputy-Chairman adjourned the trial of this charge to the next sessions, having sentenced him to three years' penal servitude in respect of the substantive offence. At the next sessions, on October 12th, a fresh jury found that appellant was a habitual criminal, and he was sentenced to a further term of five years' preventive detention. On October 1st he appealed against the refusal of the single judge to grant him legal aid, but it was granted by the full Court.

Roland Oliver for the appellant (under s. 10 of the Criminal Appeal Act, 1907), who was present. There was no power to try the charge of being a habitual criminal before a jury other than the one which had convicted him on the substantive charge. *Jennings,* 4 Cr. App. R. 120, 1910. The law in this respect has not been altered since that case. That this was the intention of the legislature is clear from the language of s. 10 of the Prevention of Crimes Act, and especially from s. 17 which applies to Scotland. S. 5, sub-ss. 3 and 4 of the Indictments Act, 1915, which gives

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power to the Court to adjourn the trial of or order the separate trial of a count, deals only with "offences" and "counts." The being a habitual criminal is not an offence, nor is the statement of the charge in the indictment a count. It is merely a statement about the *status* of the accused, to enable the Court, if that *status* is established by verdict, to deal with the case in a special manner by passing a further sentence of preventive detention.

Sir R. D. Muir (with him *Arthur Bryan*) for the Crown. It is admitted that *Jennings* is binding, but the law has been altered by s. 5, sub-ss. 3 and 4 of the Indictments Act, 1915. It must be an offence to be a habitual criminal, and the statement of the charge in the indictment was a count (*a*).

[The LORD CHIEF JUSTICE: But it is not a substantive offence.

DARLING J.: If it is a count, it should have been numbered; see r. 4 (6) of the Rules in Sched. I. to the Act of 1915. This statement is not numbered.]

That is only directory. The power to order a separate trial is given under the words in s. 5, sub-s. 3 of the Act of 1915: "Where . . . for any other reason it is desirable . . . the Court may order a separate trial," and that being an exercise of a power under the Act, the Court was given power to adjourn by sub-s. 4. Very great difficulties will arise if the Court is held not to have the power to adjourn these cases—the jury may disagree whether the accused is a habitual criminal, a juror may fall ill, or, if the whole case is tried over again, the second jury may acquit on the substantive charge.

The LORD CHIEF JUSTICE: The appellant was convicted of office-breaking and larceny, and the jury found in addition that he was a habitual criminal. He was sentenced to three years' penal servitude for the offence of office-breaking and larceny, and to five years' preventive detention on the finding of the jury that he was a habitual criminal.

The difficulty which has arisen in this case is that after the appellant had been tried for the substantive offence then

(*a*) "An allegation": *per* L. Alverstone C.J.—[ED.].

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charged against him in the indictment, that is for the office-breaking and larceny, during the trial of whether or not he was a habitual criminal, the prisoner himself said that he could call evidence to prove that he had been in honest employment, and therefore had not been persistently leading a dishonest or criminal life; but he had not that witness present. He had not given the information to the police which would enable the police to call the witness; he seemed to be suspicious of giving the name to the police, and consequently the witness had not been summoned to attend the proceedings. The learned Deputy-Chairman, after considerable discussion, and having the point now under discussion very present to his mind, adjourned the trial whether or not the appellant was a habitual criminal, and passed the sentence of three years' penal servitude upon him for the office-breaking and larceny, and later on, at the next session and before another jury, the question whether or not he was a habitual criminal was tried. The jury found he was. On that occasion he could not call the witness, and no witness was called on his behalf, and he was then sentenced to five years' preventive detention.

On appeal to this Court, it is said that those proceedings upon the adjournment ought to be declared by this Court null and void —both the finding and sentence upon it. The reason of that, as contended by his counsel, is that there is no power to adjourn the case, inasmuch as the statute for the Prevention of Crime, the Act of 1908, provides according to its proper interpretation that when in addition to the substantive offence for which the prisoner is indicted the charge is made that he is a habitual criminal, and the prisoner denies it, the jury have to try the case whether or not he is a habitual criminal, and that the jury to try it must be the same jury that has already tried whether or not he committed the substantive offence; and inasmuch as in this case it was not the same jury, but a different jury, trying separately at another session whether or not this man was a habitual criminal, that the proceedings are irregular, and the finding cannot stand.

It is conceded by counsel for the appellant that there are no merits in the appeal, because upon the facts this man got the benefit of an adjournment which was granted by the learned Deputy-Chairman in the interest of the prisoner, and the point relied upon is simply a technical point of law. We must, however, bear in mind that the decision on a matter of law, even in a

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case in which there are no merits, is nevertheless a decision which must be followed in other cases, and we must consider it as a point of law and determine it without regard to the merits.

Now s. 10 of the Prevention of Crime Act, 1908, gives power to the Court to pass sentence of preventive detention in addition to penal servitude; it is enacted by sub-s. (4): "In the proceedings on the indictment the offender shall in the first instance be arraigned on only so much of the indictment as charges the crime." In the present case that is the substantive offence of office-breaking and larceny; and then the statute proceeds: "and if on arraignment he pleads guilty or is found guilty by the jury, the jury shall, unless he pleads guilty to being a habitual criminal, be charged to inquire whether he is a habitual criminal, and in that case it shall not be necessary to swear the jury again." In our judgment, the whole question in this case depends upon whether or not the charge made against him of being a habitual criminal is charging him with a crime or offence, or whether it is only stating a condition which would enable the Court, if the condition is satisfied, to deal further with the prisoner. We are of opinion that the argument of appellant's counsel is sound, and that there is nothing in this statute which would justify us in saying that the charge in the indictment of being a habitual criminal is in effect charging the prisoner with a crime or offence. If, of course, it is a crime or an offence, then the charge is a separate count in the indictment. If, on the other hand, it is not the charge of a crime or offence, the allegation in the indictment is notice of the intention to establish, if the prosecution can, the *status* of a habitual criminal against this man.

There is authority for the view that the charge of being a habitual criminal can only be tried by the same jury that has already convicted the prisoner of the substantive offence, in the case of *George Jennings*, in Court of Criminal Appeal Reports, Vol. 4, page 120. During the course of the argument Lord Phillimore, who was then a member of the Court, said: "As the law is at present, when a prisoner is found guilty of a first charge, the charge of being a habitual criminal must be tried at the same sessions, and cannot be postponed; you cannot split an indictment," and then he says that he has written to the Home Secretary about the desirability of a postponement being made, or for arrangements to be made to enable postponements to be made

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in proper cases. Mr. Justice Darling, who delivered the judgment of the Court (which consisted of himself, presiding, Mr. Justice Phillimore and Mr. Justice Bucknill), said at the end of the judgment: "It is, however, a defect in the Prevention of Crime Act, 1908, that it does not allow the charge of being a habitual criminal to be adjourned on the application of a prisoner in the proper case. This Court desires to suggest for the consideration of the Home Secretary whether it is not desirable to amend the Act to allow such a course to be taken." It is a decision of this Court that the charge cannot be adjourned. It is unnecessary therefore to consider elaborately the provisions of the Statute of 1908; but it is, however, worthy of observation, first, that by s. 17 the provisions of the Act are applied to Scotland, and that the words in sub-s. (3) indicate that in Scotland it must be the same jury that tries the man for being a habitual criminal as has already convicted him of the substantive offence. Although it is quite true that the language of that section does not apply to the procedure in England, it has some bearing when there is an ambiguity (if ambiguity there is) in the section prescribing the English procedure.

Turning to s. 10 we think that the object of the legislature is clearly shown by reference to sub-s. (1). It empowers the Court to pass a further sentence if the prisoner is found to be a habitual criminal. That seems really the key of the question so much discussed to-day, and indicates that the Act was not intended to enable the Court to convict of another offence, but was intended to enable the Court, when the prisoner has been convicted of the substantive offence for which he is indicted and has been sentenced to at least three years' penal servitude, to pass "a further sentence, ordering that on the determination of the sentence of penal servitude," he be detained for a further period.

It is plain, looking at the language of this statute, that the intention of Parliament was, that if the man is found to be a habitual criminal, then, in addition to the sentence of three years' penal servitude for the substantive offence, he may be sentenced to preventive detention.

This seems to us to indicate that Parliament was not creating a new offence, and there is nothing in the language throughout the statute to imply that a new offence is created. The question before us to-day is in substance whether Parliament has amended the

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law since the case of *Jennings* was decided. The argument is that Parliament has amended the law by the Indictments Act of 1915, and that by s. 5, sub-s. (3) and (4), power is given to the court to adjourn or to order a separate trial, as the court may think fit. The difficulty of the Crown is that s. 5 deals only with amendments of a count or the postponement of the trial of a count or the postponement of the trial of a count or of an indictment, and from beginning to end the section relates to offences or the trial of offences. An indictment contains, of course, a particular form of charge presented against a person of having committed a crime or offence. A count is part of the indictment. There may be a series of counts, but each one of those counts charges a crime or offence; there is no count in an indictment which does not charge a crime or offence; and whenever you find in the statute the words "indictment" or "count" it must be assumed, according to the ordinary interpretation of language, that Parliament is dealing with the charge of a crime or offence. Some distinction has been made between crime and offence in the case to which reference is made (*a*), but it has no application to this case. No doubt under the Prevention of Crimes Act, 1871, crime is there defined; the Act applies to certain offences there called crimes; but reference to that case does not help us to decide the present. For the purpose of this case no distinction is to be made between a crime and an offence.

The Rule under the Indictments Act to which our attention has been called, so far from assisting the case for the Crown, appears to us to be against it. In Rule 11 occur these words: "Any charge of a previous conviction of an offence, *or* of being a habitual criminal or habitual drunkard, shall be charged at the end of the indictment by means of a statement." Now a distinction is there drawn between a count which charges an offence and a statement of the previous conviction of an offence or of being a habitual criminal or a habitual drunkard, which statement, it is provided by the Rules, shall be made at the end of the indictment. This supports the view that to be a habitual criminal within the meaning of the statute is not a substantive offence, but is a state of circumstances affecting the prisoner which enables the court to pass a further or additional sentence to that which has been already im-

(*a*) *Penfold*, 1902, 1 K. B. 547.

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posed; and if that is so it must necessarily follow, as was pointed out in *Jennings's case,* that the trial of the substantive offence and that of the condition of a habitual criminal cannot take place at separate sessions or by a different jury.

The result is unfortunate, as in this case the appeal must be allowed and the sentence quashed.

It naturally follows that we do not interfere with the conviction on the substantive offence and the sentence of three years' penal servitude. We only deal with the charge of being a habitual criminal.

I would add that the learned Deputy-Chairman invited a decision, because, apparently, this procedure had been the subject of discussion, and he came to a conclusion to do as he thought best, leaving it for this Court to determine once and for all the proper course to be adopted in these cases.

Sentence of preventive detention quashed.

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In the proviso to sub-s. 3 *of s.* 16 *of the Perjury Act,* 1911, 1 & 2 *Geo.* 5, *c.* 6, *the words "punishable only on summary conviction" mean that the offence cannot in any circumstances be punished by a term of imprisonment longer than three months, and therefore exclude an offence which is indictable.*

The Court leans to the view that when restitution for an offence has been made, the maximum *sentence should not be inflicted.*

Appeals against convictions and sentences.

The appellants were convicted, under s. 5 (b) (*a*) of the Perjury Act, 1911, on July 15th, at the Hampshire Assizes, before Mr. Justice Bray, of wilfully and knowingly making false statements on their income tax returns, and of conspiracy to defraud the Revenue, and were sentenced to two years' imprisonment without hard labour. They were on bail.

Sir R. D. Muir (with him *Harold Murphy*) for Bradbury. There was no jurisdiction to convict the appellant on indictment. By s. 16, sub-s. 3 of the Perjury Act, 1911, it was enacted that "where the making of a false statement is by any other Act, whether passed before or after" the Perjury Act, "made punishable on summary conviction, proceedings may be taken either

(*a*) "If any person knowingly and wilfully makes (otherwise than on oath) a statement false in a material particular, and the statement is made—(b) in an abstract, account, balance-sheet, book, certificate, declaration, entry, estimate, inventory, notice, report, return, or other document which he is authorised or required to make, attest, or verify by any public general Act of Parliament for the time being in force, he shall be guilty of a misdemeanour. . . ."

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under such other Act"—*i.e.*, summary proceedings—"or under this [the Perjury] Act"—on indictment. But by the proviso to that sub-section, "where such an offence is by any Act passed before this" [the Perjury] "Act, as originally enacted, made punishable only on summary conviction, it shall remain only so punishable." This offence was created by s. 94 (*b*) of the Finance (1909-10) Act, 1910 (10 Edw. VII. c. 8), which section made it punishable on summary conviction. This offence, therefore, is "punishable only" on summary conviction, and consequently remains only so punishable under the provisions of the proviso to s. 16, sub-s. 3.

Counsel also argued that the judge misdirected the jury.

On the question of sentence counsel said that the hope had been expressed that one of the results of that Court would be a standardisation of sentences.

[The LORD CHIEF JUSTICE: That would be impossible.]

In twenty-one cases of this kind during the past four years, the *maximum* sentence had been twelve months' imprisonment, and that had been passed in only four of the cases. He contended that the punishment in the present case was excessive, having regard to precedent. His client had voluntarily paid to the Inland Revenue the whole amount of unpaid tax, although he need not have paid the deficiency further back than three years.

[The LORD CHIEF JUSTICE: There is a three years' limit for the recovery of unpaid tax, but it could not be argued that taxes of which the Inland Revenue had been defrauded were not recoverable after three years.]

Counsel was informed that it was the practice of the Inland

(*b*) "If any person for the purpose of obtaining any allowance, reduction, rebate, or repayment in respect of any duty under this Act, either for himself or for any other person, or in any return made with reference to any duty under this Act, knowingly makes any false statement or false representation, he shall be liable on summary conviction to imprisonment for a term not exceeding six months, with hard labour."

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Revenue not to insist upon the payment of arrears of taxes for a longer period than three years.

Inskip, K.C., for the Crown. That was due to the belief that as, under the Act, nothing could be assessed, nothing could be recovered.

[The LORD CHIEF JUSTICE: It must not be thought that we accept the principle; it may be the practice, but I do not think it was the law.]

Sir Ellis Griffith, K.C. (with him *Harold Murphy*) for the appellant Edlin, adopted *Muir's* argument.

Travers Humphreys (with him *Inskip, K.C.*, and *T. H. Parr*) for the Crown, were only called upon to argue whether counts 2, 4, 6, 8 disclosed indictable offences. The punishment which under s. 94 of the Finance (1909—10) Act, 1910, can be inflicted is imprisonment not exceeding six months, *i.e.*, exceeding three months. That being so, then under the provisions of s. 17, sub-s. 1, of the Summary Jurisdiction Act, 1879, a person accused of an offence under s. 94 of the Act of 1910, has the option of electing to be tried by a jury. The offence, therefore, was not "punishable only on summary conviction" within the meaning of the proviso to sub-s. 3 of s. 16 of the Perjury Act, 1911, and was indictable, at the option of the prosecution, under the earlier part of the sub-section.

Counsel referred to the Customs Laws Consolidation Act of 1876, for an instance where, in s. 168, the words "counterfeit, falsify, or wilfully use, &c.," appearing, the offence was punishable only on summary conviction, viz. by fine (100*l.*). He also referred to s. 25 of the Customs and Inland Revenue Act, 1869, and s. 37 of the Larceny Act, 1861, on the same point. The consolidating statutes, the Forgery Act, 1913, and the Larceny Act, 1916, contain sections similar to s. 16 of the Perjury Act. He cited *Brown*, 1895, 1 Q. B. 119, and the judgment of Lord Russell C.J., at p. 126. Counsel further said that the Inland

Revenue did not desire him to argue any matter in relation to sentence.

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THE LORD CHIEF JUSTICE: The appellants were convicted separately on every count of an indictment, which charged in the first count a conspiracy between them during a period extending from December, 1900, to June, 1919, to defraud the Inland Revenue in respect of income tax, super tax, and excess profits duty, by false statements, false accounts, and false returns. Then they were charged and convicted on counts 2, 4, 6 and 8 of making false statements in the returns for income and super taxes, contrary to s. 5 (b) of the Perjury Act, 1911. Another count, No. 10, framed under the same section, related to a return for excess profits duty. There were other counts in the indictment charging them with the offence at common law of defrauding the revenue, making in all fourteen counts. The jury answered specific questions put to them by the learned judge, and convicted the appellants on all counts.

The appeal was based on two main grounds. It was said first that the counts 2, 4, 6 and 8, under the Perjury Act, were bad in law and should be quashed, and further it was sought to argue that the other counts, except 10, were also bad in law, as no such offence was known to the law. That part of the case has not been argued, and we say nothing with regard to it. If the appellants were rightly convicted on the conspiracy count, and further, if they were rightly convicted on the perjury counts, it would be idle to discuss the other points, which would be a mere academic discussion on points of law. The substance of the whole case was really in the conspiracy count. As regarded that it had been said that the verdict was against the weight of evidence, and that there was misdirection; there was no other complaint made of the verdict of the jury on the conspiracy count. If the conviction was right on that count, the appellants would be properly convicted of a deliberate system of deceiving and defrauding the revenue authorities. The result of the jury's verdict was to establish that the revenue was defrauded between the years 1900 and 1919 of 59,000*l.*

His Lordship proceeded to review the facts: it was admitted on evidence which could not possibly be controverted that these frauds were committed by sending in false returns every year.

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Edlin confessed that he had committed the frauds deliberately, and said that Bradbury knew nothing about it, and if that were true he was not guilty of conspiracy. The jury were entitled to take the view that Edlin was acting in collusion with Bradbury, and upon the evidence they were justified in arriving at that conclusion.

As regarded the alleged misdirection on the part of the learned judge, they had said again and again that a judge was entitled to indicate to the jury his view of the facts so long as he made it clear that the decision was for them, and provided he did not mislead the jury in any way. They were satisfied that there was no ground for interfering with the verdict on any of the counts on the score of misdirection. There had been no misdirection, and it could not be said that the verdict was against the weight of evidence.

It was also contended that under the Perjury Act the offences with which the appellants were charged in counts 2, 4, 6 and 8 were offences for which the appellants were not indictable. The charge made was for knowingly and wilfully making a statement that was false in a material particular. That offence was based on the Perjury Act, s. 5 (b). The objection to that was that by virtue of s. 16, sub-s. 3, this offence was not an offence for which the appellants were indictable, because it was said that in the proviso of sub-s. 3 there was a saving clause which had the effect of making those persons indictable only who were punishable otherwise than on summary conviction. It was said that this offence was punishable only by s. 94 of the Finance (1909—10) Act, 1910, which imposed a penalty on summary conviction of imprisonment not exceeding six months with hard labour. As this Act was passed before the Perjury Act, 1911, and had not been repealed, the result was that an offender was liable only on summary conviction, and that the appellants therefore came within the language of the proviso in s. 16, and could not be indicted. If the appellants could have made good that proposition they would have succeeded, but "punishable only" meant that persons could not be punished otherwise than on summary conviction. But by s. 17 of the Summary Jurisdiction Act, 1879, where a person is charged before a court of summary jurisdiction with an offence in respect of which he is liable to imprisonment for a term exceeding three months, and which is not an assault, he may claim

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to be tried by a jury. Where a person took advantage of that provision, all the consequences of an indictable offence must follow, as is shown in *Brown*, 1895, 1 Q. B. 119. Once it was realised that this offence was not an offence for which the *maximum* punishment was three months, it followed that it was not an offence punishable only on summary conviction. The moment they found that it was an offence for which more than three months' imprisonment could be adjudged, and it was not a case of assault, it could become an indictable offence. In their judgment there was no substance in the point that had been raised. Their view was that the legislature, when it passed the Perjury Act, 1911, which was a consolidating statute, intended to bring into one clause a whole series of offences which had been previously dealt with in several sections of several Acts of Parliament; and in s. 5 a number of offences of this class were brought into the section making them indictable offences punishable by two years' imprisonment. The proviso was for the purpose of providing against the possibility that a person who hitherto could never have been sentenced to a longer term than three months should have his offence magnified into an indictable offence for which he could suffer two years' imprisonment. The appeals must be dismissed.

Upon the question of sentence, forcible arguments had been addressed to them by the appellants' counsel to the effect that complete restitution had been made—that the revenue had in fact received the whole 59,000*l*. of which it had been defrauded—and, moreover, that the information upon which the proceedings had been launched and carried to a successful conclusion was given in a book which Edlin gave up to the accountant who was examining the accounts. They were not unmindful of the observation that had been made that they should not give the *maximum* sentence when an offender made restitution, but it was of great importance that persons committing these offences should understand that they must be severely punished when detection ensued. In that case there had been deliberate fraud for twenty successive years, for which both the appellants were responsible. They were liable to two years' imprisonment with hard labour on each of the counts. The learned judge had all the facts before him when he sentenced them to one term of two years' imprisonment without hard labour. He had not given them the *maximum* punishment, and they did

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not think they should interfere with the sentence. The appeal would be dismissed.

Upon the application of Sir R. Muir, the Lord Chief Justice said they saw no objection to the sentences being served in the second division.

Appeals dismissed.

Solicitors for the Appellants—*Minet, Pering, Smith & Co.*

Solicitor for the Crown—*Solicitor of Inland Revenue.*

W. E. H.

BEFORE

THE LORD CHIEF JUSTICE, MR. JUSTICE AVORY AND MR. JUSTICE SALTER.

REGINALD BUCKLAND.

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It is not a ground for quashing a conviction that the jury knows that counsel has advised the defendant to plead guilty.

A judge, semble, *ought not to suggest that defendant's evidence in effect charges that of the prosecution with perjury, if the former can be construed as meaning that the latter was mistaken.*

The appellant was convicted at the London Sessions, on 29th October, 1920, of using a house for the purpose of betting, and sentence was postponed. He had since been sentenced to two months' imprisonment, and ordered to pay the costs of the prosecution. He asked for leave to appeal against conviction and sentence. He was on bail.

Sir Ernest Wild, K.C. (with him *Fox-Davies*) for the appellant. Appellant was convicted of keeping a betting-house contrary to the Act of 1853. The whole question was whether he was standing in the doorway or in the street; it was only the difference of one foot. If he was within the doorway he came under the Act of 1853, but if not he came under the Act of 1906. The learned Chairman, in summing up, represented to the jury that the defence was alleging that the police were lying, whereas all they contended was that the police were mistaken. When the police raided the house they were disguised—suitably for Poplar—as dock labourers, and they could not see with certainty where the man was. He persisted all through that he was in the street, and admitted that he took bets there.

[AVORY J.: Is not the forecourt a part of the house? Sup-

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posing he was within the railings, would not that be within the house?]

Wild: The Court in which the case was tried was a small one, and the jury were doubtless influenced by seeing the appellant's counsel advising his client to plead guilty. The man refused, saying that he was not in the house but in the street. Counsel objected to the Chairman saying that the defence was that the police evidence was all a lie. It was not fair to the defence to have it put to the jury that if they acquitted the defendant they would be convicting the police of perjury.

AVORY J., said that the appellant applied for leave to appeal on four grounds, (1) that counsel for the prosecution had stated that appellant had been twice convicted of street betting, (2) that the Chairman had misdirected the jury, (3) that the summing-up did not put the defence fully and fairly to the jury, and (4) that the jury must have become aware that his counsel was advising him to plead guilty. The first ground had been abandoned, because it was part of the case for the defence that the appellant had been guilty of street betting. As for the second ground he thought the judge simply meant that if it was not a mistake, then the police must have been stating what they knew to be untrue. Thirdly, he thought that the judge had put the defence fairly and fully. The man had been convicted of street betting, and did not want to be convicted again. Therefore he had taken rooms in two houses, and when he saw anyone who looked suspicious he ran into one house, escaped over a wall, and appeared at the front door of the other house. He was like a rabbit, and no wonder the jury convicted him. Lastly, if the jury drew the inference that appellant was advised to plead guilty, they were right in thinking so: though that is not the inference to be drawn from counsel conferring with his client in the dock. The learned judge, if he had erred at all, had erred on the side of leniency, and the application must be dismissed as regards both conviction and sentence.

Application dismissed.

Solicitors for Applicant—*Engall and Crane.*

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WILLIAM HENRY COLLIER AND ALBERT THOMAS EPPS.

Severity of consecutive sentence.

These appellants were convicted at the Nottinghamshire Sessions, on October 18th, of office-breaking, and were sentenced to eighteen months' imprisonment with hard labour. They appealed against sentence, in person.

The LORD CHIEF JUSTICE said that the appellants had pleaded guilty to office-breaking and larceny. On 13th June they broke into the offices of a coal merchant and stole goods and a bicycle. They were arrested on suspicion, but there was not sufficient evidence against them, and they were released. In July they were in custody at Croydon on a charge of horse stealing, and Epps made a statement in consequence of which they were successfully prosecuted on the previous charge. They were sentenced at Croydon to six months' imprisonment with hard labour, and were then taken to Nottingham, where they were sentenced to eighteen months' imprisonment with hard labour. The Court had come to the conclusion that the latter sentence was too severe, taking into account the fact that it was the appellants themselves who confessed to the crime when they were arrested on another charge. The term of eighteen months would be reduced to six months, consecutive on the sentence passed at Croydon.

Sentences reduced.

NORMAN WEISZ.

The Court will not hear a witness whom the appellant deliberately declined to call at the trial.

Observations on appeals on the ground that the verdict was against the weight of evidence.

This appellant was convicted at the Central Criminal Court, on 27th September, 1920, of conspiracy, and of winning money by fraud in wagering, and was sentenced to fifteen months' imprison-

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ment with hard labour, and ordered to pay the costs of the prosecution, which had been instituted by the Jockey Club. He appealed against conviction on certificate by Mr. Justice Greer, who tried the case. He was on bail.

D. Hogg, K.C. (with him *Curtis Bennett, K.C.*, and *Zeffertt*) for the appellant. There has been a very grave miscarriage of justice; the appellant ought to have been acquitted. Certain evidence which was not before the jury ought to have been laid before them. He asked leave to call a Mrs. Thomas, who had been on her way from Australia when the trial took place, and evidence from a bank that 500*l.* had been paid into Barrie's account the day after the race at Cheltenham, when a disguised horse had been substituted and had won. The fraud that had been perpetrated was this: Barrie, who had apparently organised other similar frauds, had conceived the idea of entering for the Malvern Selling Race a horse which had no existence, and then of running a disguised horse under the false name of the horse entered, thereby almost ensuring that the race would be won by the unknown horse at long odds. The fraud was successfully perpetrated. "Silver Badge" was entered, and "Shining More," disguised, ran the race and won, with the result that large sums of money were netted. The prosecution said that Weisz was chosen to do the betting, and to buy the disguised horse after the race. There was no doubt that Weisz did buy the horse, but he did so innocently, and there was no evidence that he ever shared his winnings. The prosecution said that there was no one else who was in a position to buy the horse, but the bank evidence would show that a man named Gilbert Marsh had actually paid money into Barrie's account with which the horse could have been purchased.

Gill, K.C., for the respondents, objected to the calling of Mrs. Thomas. He said that her evidence was purely an afterthought, for Weisz had given instructions that no lady witnesses were to be called at the trial. They were intentionally kept out of the box. The point with regard to the bank witness was a purely imaginary one.

The LORD CHIEF JUSTICE: The application to call the lady must be refused. The appellant's legal advisers knew the case they

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would have to meet, and no application was made to adjourn the trial. There was no surprise. The policy was deliberate of resting the defence upon the evidence of the accused and Mr. Thomas, and no precedent could be cited for calling a fresh witness in those circumstances. That Court had taken care to state that they would not allow a witness to be called except in special circumstances, which they had been careful not to define. Here the defence had deliberately elected to proceed and take its chance with the witnesses then available. With regard to the other witness, they might be stretching the policy of the Court in favour of appellant, but they would allow formal evidence to be called.

A clerk from Barclay's Bank at Hampstead deposed that 500*l.* had been paid into Barrie's account by Gilbert Marsh, as stated by counsel.

Hogg, K.C., proceeded to outline the case for the defence as presented at the trial. He said that Weisz was born in Hungary in 1879, and came to this country in 1897. Here he built up a business as a jeweller, until, in 1914, he was one of the leading pearl merchants in London. His income was substantial, and, as a bachelor, he became minded in 1919 to take his relaxation in the form of horse racing. He became acquainted with Marsh, who induced him to buy racehorses, and he registered as owner in the name of "Mr. Norman." Later on he met Barrie, who warned him against Marsh. On the eve of the race meeting at Cheltenham Barrie came to the appellant's flat, and in the presence of Mr. and Mrs. Thomas, told him that a good horse was running next day, and he urged Weisz to go to the races. Weisz asked for the name of the horse, but Barrie refused to give it, as he did not want to spoil the market. Next morning Weisz went to Cheltenham with Mr. Thomas, and just before the third race he met Barrie on the course and again asked the name of the horse. Barrie said he would only divulge it if Weisz promised to buy the horse afterwards, and the appellant agreed. He laid 300*l.* on "Silver Badge" with six bookmakers, and won 3,100*l.*, and afterwards bought the horse. He boasted to his friends that he had bought "Silver Badge," but had not the slightest idea that the horse was really "Shining More," which had been painted. It was not till months afterwards that he heard rumours that all was not right.

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When he wanted to see the horse and show it to some friends, Barrie always made some excuse or other for not producing it.

Counsel complained of the way in which counsel for the prosecution had addressed the jury in his closing speech for the prosecution. Crompton J., in *Puddick*, 4 F. & F. 499: 1865, had said that counsel for the prosecution should regard themselves as ministers of justice, and ought not to struggle for a conviction, yet Mr. Gill had seen fit to lay great stress on the fact that at the police court Weisz had not gone into the witness box and given his version of the story. As a matter of fact, his counsel had advised him to reserve his defence, but counsel, in the course of his whole day's speech to the jury, had said that no honest man, even if he were legally advised to do so, would refrain from giving evidence.

[AVORY J., said he thought that the late Lord Chief Justice had been of Mr. Gill's opinion on that point.]

Hogg pointed out that Lord Alverstone C.J., in addressing a grand jury, had alluded to the Poor Prisoners' Defence Act, and had stated that it was desirable that an accused person should indicate the nature of his defence as early as possible, but that this might be done by cross-examination or otherwise and not necessarily by adducing evidence.

[The LORD CHIEF JUSTICE: Mr. Gill had said that no honest man would fail to give evidence at the first available moment at the police court, and no counsel would advise a man to reserve his defence unless he had no defence.]

Hogg: That statement must have had tremendous weight with the jury, coming as it did two or three days after the evidence had all been given. Counsel had also suggested in his cross-examination of Weisz that the appellant had been a party to spiriting away the horses, and that that was the reason why he had gone to Belgium.

[The LORD CHIEF JUSTICE: If there was proper evidence to support the finding of the jury, what did it matter what the

observations of counsel were? The case must rest upon the evidence and the direction of the learned judge.]

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Gill, K.C. (with him *Reginald Coventry* and *Vernon Gattie*) for the respondents. This was an attempt to re-try the case on the speech of counsel, founded on his interpretation of the evidence of witnesses whom their lordships had not seen, and of whose veracity they had no opportunity of judging. If ever a case was tried fairly it was that of Weisz, and a perusal of his lordship's summing-up would shew that he presented the case for Weisz in the most favourable way to the jury.

[The LORD CHIEF JUSTICE said that it was a most careful, painstaking summing-up of the evidence; if anything it leaned rather in favour of the defendant.]

Gill: The question the jury had to decide was put to them fairly by both counsel for the defence and himself, and the question was whether the story told by Weisz was a true story. The case for the prosecution was that it was an impossible story; it was absolute invention; and the jury took that view. These people got to the course, and what struck terror into Weisz was the fact that the conspirators thought a former owner of "Shining More" was at the races. In buying in the horse Weisz was preventing any other person from discovering the fraud.

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The LORD CHIEF JUSTICE: The appellant was convicted on an indictment which charged him with conspiring with Barrie, Lawley and Berg to obtain by false pretences the stake money of a race run at Cheltenham; to cheat and defraud owners of racehorses, and to cheat and defraud persons who might be induced to bet, and, in five counts, of obtaining money by fraud in certain specific cases. He appealed against conviction on certificate granted by the learned judge. At the outset of the hearing of this appeal, application was made to them to hear evidence on two grounds. The Court had allowed evidence to be given by a bank official to prove certain payments in, of which the appellant's legal advisers knew nothing beforehand. The new evidence, however, had not affected the case in any way.

The appeal was based upon the ground that the verdict was

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against the weight of evidence—that it ought to be set aside on the ground that it was unreasonable, and ought not to be supported having regard to the evidence given. It was to be observed in that case that no complaint was made, or could be made, on the summing-up of the learned judge upon the facts, and his direction of law to the jury; it was elaborate; it was most careful; and it was really a model of fairness and impartiality, inasmuch as the learned judge never failed to put the points, both for the prosecution and for the defendant, and dealt with the arguments on each side so as to guide the jury, to help steer them in a proper course, which perhaps might be all the more necessary in this case, as during part of it there was some little heat in advocacy, and the learned judge put right everything in that regard by his direction.

They must approach this case on the basis that no fault could be found with the summing-up by the learned judge. The case must stand or fall upon it being established for the appellant that, upon the evidence given, the verdict was unreasonable. It must be borne in mind that it was not suggested in this case that there was not evidence given by the prosecution sufficient to support their case. That could not be suggested on the evidence that had been given, and no argument had been submitted to them to that effect. There was evidence given by the prosecution which, unexplained, admittedly justified the conviction of the appellant if the jury chose to find a verdict against him. The real point in the case was that it was contended for the appellant that the explanation which he gave by his evidence and the other evidence called on his behalf, was evidence which the jury ought to have accepted, and therefore that it was unreasonable of the jury, having regard to the explanation given by the defendant, to convict him. That was the logical basis on which this case must rest. They must ask whether they were satisfied that the evidence given by the defence in explanation of the case made by the prosecution was of such a character that they should set aside the verdict and reject the conclusion of the jury, who did not accept the defence put forward.

Having reviewed the whole of the evidence in the case, so far as it was material, with the assistance of counsel, they were of opinion that they would not be justified in interfering with the verdict of the jury. The main points made by the appellant rested,

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of course, upon evidence given by himself and others in support of his testimony and in corroboration of it. Quite briefly put, there was a disgraceful fraud committed. A horse which did not exist was entered for a race at Cheltenham under the name of "Silver Badge." A horse which did exist, and had won races, and was known on the racecourse, did run the race under the name of "Silver Badge," but inasmuch as the description of "Silver Badge" would not tally with the appearance of "Shining More," which was already known, it became necessary to disguise "Shining More." Consequently, the tail was pulled, and the horse was painted a different colour; a star on its head was painted, the white fetlock was painted, and other devices were used for the purpose of preventing anybody from discovering that the horse was in fact "Shining More." It seemed quite plain, on the evidence even of those who were not racing experts, that if an unknown horse—with a practically unknown owner, without a jockey up to the last minute, running under colours which the jockey had ridden in in the previous race—came into the betting and nobody knew anything about it, what would be described as a good price could be obtained from the bookmakers. The case made was that this fraud was concocted by Weisz with Barrie, and, it was said, with Lawley and Berg. It was an elaborate device to obtain money by fraud by means of bets which would be won as a result of the race. The race was run, the horse entered as "Silver Badge" won quite easily, apparently, and was afterwards sold. The whole point with which they had to deal was whether Weisz was a party to the conspiracy. On the part of the prosecution the case was that Weisz was a wealthy man, and could bet with the bookmakers as a man of credit, and no particular attention would be directed as to his making many bets on the same race. It was further said that he was used, and allowed himself to be used, for this purpose with Barrie, so that he might be the means of obtaining large bets, and that, further, his part was to buy the horse. It was a selling race; the horse was sold; it had been put in at 100 guineas; it fetched 510 guineas, and the purchaser was the appellant, who raced under the name of "Norman." That name was given when the horse was sold, and he became the purchaser. *Primâ facie* they had facts of great importance, one that Weisz made bets and won 3,000*l*., and another that he purchased the horse for 510 guineas. The prosecution said that he never

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would have bought the horse but for the fact that he knew perfectly well that the horse must not get into other hands than those of Barrie, Berg, Lawley, or his own, because as soon as anyone washed or cleansed the horse they would find out that it was painted, and the whole fraud would have been discovered. The only thing remaining was to conceal the fact that this horse which had won was in fact the comparatively well-known horse "Shining More." It became very important to examine what did take place. It was admitted that Weisz made 3,000*l.*, but it was said that it was an ordinary stake, and that the money was kept by him. There was no proof that he dealt with this money otherwise than as stated by the defence, and he had betted in larger amounts before. The difficulty of this argument, and the impossibility of accepting it as conclusive, was, first, that there was evidence that the instructions to Weisz's clerk in London, whose business it was to put money on at starting price with the London bookmakers, were that as much money was to be put on as possible. The result was that money was put on to the extent of some 200*l.* at starting price, besides 150*l.* put on the race by the appellant at Cheltenham. That disposed of the suggestion that he was only doing an ordinary transaction. The second point was made by the evidence that Barrie himself said he had made some 7,000*l.*, and Lawley some 400*l.* The conspiracy was equally proved if it were established that each one of the persons was making what he could for himself. It was sufficient, for this case, to say that that evidence did not enable them to accept the contention of counsel that those two points were such that the jury were bound to accept the statement made by Weisz and his witnesses.

It was further argued that the documents which came into existence were inconsistent with the case made by the prosecution, and were in truth in the appellant's favour. Weisz's story was an odd one. Ten minutes before the race was run he met Barrie and first heard the name of the horse, which name Barrie would only give on the one condition that Weisz would buy the horse. It was puzzling to understand why Weisz should buy the horse in if all was quite satisfactory, or why Weisz, thinking this was a perfectly innocent transaction, should have been prepared to fall in with the proposal so readily without making inquiry. Nowhere did he give an explanation which could be regarded as conclusive or satisfactory. There was the further point which made it diffi-

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cult to understand his case—that no trouble was taken by him thereafter with regard to the horse. He might have explained that he had arranged to leave it all to Barrie. He bought this horse for 510 guineas, got the delivery order, and there the matter was left. That was quite consistent with the case put by the prosecution. It was for Barrie to remove the paint; the horse had served its purpose. The jury were entitled to disregard the appellant's story with reference to this, and to find the story unsatisfactory. They came to the conclusion that his conduct on that day was inconsistent with innocence, and they were, of course, entitled to reject his story. The jury had the accounts before them, and great reliance was placed upon the documents. The suggestion was made that they were false.

Having given very careful consideration to counsel's able arguments, and having reviewed the evidence, they had come to the conclusion that they could not interfere with the verdict, inasmuch as they could not say that the verdict was unreasonable or against the weight of evidence as given at the trial. The appeal must be dismissed.

Curtis Bennett asked for a reduction of sentence.

The Court refused to interfere with the sentence, which would run from that day, the appellant having been on bail.

Appeal dismissed.

Solicitors for the Appellant—*Messrs. Raphael, Zeffert & Co.*
Solicitors for the Respondents—*Messrs. C. Russell & Co.*

PETER CHRISTIAN BARRIE AND WALTER HOPKINS.

15 *November.*

These were applications for leave to appeal against convictions and sentences. The facts were connected with the same frauds as in the case of *Weisz* (above). Barrie had pleaded guilty on 13th September to conspiracy to defraud and obtaining by false pretences, and was sentenced to three years' penal servitude, and

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PETER CHRISTIAN BARRIE AND WALTER HOPKINS.

Hopkins was convicted thereof, after trial on 15th and 16th September, and sentenced to fifteen months' imprisonment with hard labour. He was present.

Wilfrid Rutherford for Barrie, who was present.

Reading L.C.J.
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The LORD CHIEF JUSTICE, in refusing leave to appeal against conviction, said that Hopkins, with another man, had attempted to obtain 1,000*l.* from a Mr. Hardy by the false pretence that a certain horse shown to Hardy was "Coat of Mail," and had actually obtained 300*l.* by falsely pretending that another horse was "Headland." He had purchased "Coat of Mail," and later on a horse named "Jazz," the property of Sir Hedworth Meux, saying he wanted to send it to India. Instead of that, the horse was sent to Stockton, where it was run by a man named Barrie in fraudulent substitution for "Coat of Mail." It won easily, and Barrie received 167*l.*, out of which he paid Hopkins 90*l.* Hopkins said he knew nothing about the race, but there was evidence that he knew of the fraud. His explanation was that he sent the horse to Waterloo at the request of another man, but the jury took the view that that man only knew of the fraud after the race had been run.

The applications for leave to appeal against sentence would be considered after the appeal by a third man, Weisz, had been heard.

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The LORD CHIEF JUSTICE said that in the case of Barrie they could not think that three years' penal servitude in the circumstances was too severe a sentence. It was a gross fraud, cunningly devised, and it covered three separate cases of distinct fraud. Hopkins had never been convicted before, and they thought his imprisonment should be in the second division. The sentences would date from 1st November.

One sentence reduced.

Solicitor for Appellant Barrie—*H. W. Olley.*

W. E. H.

BEFORE

THE LORD CHIEF JUSTICE, MR. JUSTICE SANKEY AND MR. JUSTICE SALTER.

WILLIAM GEORGE WOOLFORD.

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Severity of sentence after previous convictions.

Appellant, who was not present, was convicted on October 18th, 1920, at the Nottinghamshire Sessions, of larceny, and of breaking into a pavilion and a factory, and was sentenced to seven years' penal servitude.

SANKEY J.: The appellant pleaded guilty to the three counts of the indictment, and was sentenced by the Chairman of the Sessions. He broke into places on three separate dates in September, and stole a number of articles, including workmen's tools. The appellant had confessed to six other burglaries and thefts in Nottingham, as well as to three in the neighbouring county of Derbyshire, making, with the three charges in the indictment, twelve in all. He had rendered some assistance to the police in recovering the stolen property, and had been doing some honest work, but his record was a bad one. He began his career of crime in 1897, and had been many times convicted, his sentences including several terms of penal servitude. Considering his long career of crime and the prevalence of these burglaries, the Court did not think the present sentence should be interfered with, and the appeal would be dismissed.

Appeal dismissed.

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Reading
L.C.J.
Sankey J.
Salter J.

JOHN DIXON AND SEP ROCKLIFFE.

Severity of sentence on youthful offenders.
In cases of pleas of guilty, a shorthand note of the proceedings ought to be taken.

The appellants pleaded guilty at the Westmorland Sessions, on October 22nd, 1920, to larceny, and each was sentenced to six months' imprisonment with hard labour.

They appealed against sentence; they were not present.

Whitley appeared for the appellants.

[The LORD CHIEF JUSTICE: The shorthand writer did not take a note which he thought was not necessary on a plea of guilty. He was obviously wrong.]

Whitley for the appellants. The theft had taken place in May, 1918, when the appellants were only fifteen years of age, and except for this crime they had led absolutely blameless lives. He contended that the sentences were excessive, and that appellants ought not to be penalised because they were not detected at the time.

SALTER J.: The value of the articles stolen was nearly 230*l*. Appellants had not been in trouble before, and every criminal court thought that in the case of a first conviction of young people they should be dealt with leniently, and if possible should not be sent to prison. The appellants were reported as unsuitable for Borstal, and the question to be considered was whether they should be released on recognisances or sent to prison for a short period. The Court had come to the conclusion, in view of the report from the justices, that in this case it would not be right to release these young men. A moderate term of imprisonment was necessary.

Appeals dismissed.

Solicitors for Appellants—*Kinch and Richardson,* Agents for *Messrs. Thompson and Wilson,* of Kendal, for Dixon; *Milne, Moser & Sons,* of Kendal, for Rockliffe.

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Reading
L.C.J.
Sankey J.
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WILLIAM COLEY.

Severity of consecutive sentences.

The appellant, who was present, was convicted at the County of London Sessions, on October 26th, 1920, of office-breaking, and was sentenced to three months' imprisonment with hard labour. He was also convicted on two charges of receiving, and was sentenced to three months' imprisonment with hard labour, the sentences to run consecutively on each charge, making nine months' imprisonment in all. He appealed against conviction and sentence on the charge of office-breaking.

SANKEY J.: There were extenuating circumstances with regard to the stealing of an umbrella. The conviction was right, but having regard to the evidence the Court thought that the sentences on the two charges of receiving should run concurrently. The result would be that the term would be six months instead of nine.

Sentence reduced.

MICHAEL O'KELLY SIMINGTON.

The "plan" referred to in s. 2 (1) *of the Official Secrets Act,* 1911, 1 & 2 *Geo.* 5, *c.* 28, *does not apply exclusively to a plan of "a prohibited" place as defined in sect.* 3.

Evidence may be given of any things being found in the control or possession of defendant if they tend to prove the mens rea, *which is an essential ingredient of the charge in issue.*

The appellant was convicted at the Central Criminal Court, on October 21st, 1920, of larceny by a public servant, and of wrongfully retaining plans, and was sentenced by McCardie J. to fifteen months' imprisonment with hard labour. He appealed against conviction on a point of law.

Charles, K.C. (with him *J. D. Caswell* and *J. MacVeagh*) for the appellant, who was present. There were several grounds of

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appeal on law: (1) that the learned judge was wrong in law in holding that sect. 2 of 1 & 2 Geo. V. c. 28, the Official Secrets Act, 1911, was applicable to plans other than plans of "prohibited places" within the meaning of sect. 3 thereof; (2) that the judge was wrong in law in holding that certain documents and other articles found in the possession or control of the appellant, and oral evidence relating thereto, were admissible in evidence; (3) that the judge had misdirected the jury; and (4) that the judge had omitted to call the attention of the jury to certain material facts. With regard to (2), there had been a legal argument during which the jury had retired. Defendant's counsel objected to certain exhibits (an Irish republican flag and some documents of a seditious nature) being put in evidence against defendant; he suggested that such evidence was irrelevant to both charges (larceny and that under the Official Secrets Act) and could only serve to prejudice the minds of the jury against defendant, as a disloyal person. McCardie J. held that as the Crown had to prove "conscious detention" of the things charged, "the exhibits referred to are relevant for the consideration as to the consciousness and object of the intent," viz. that of permanently depriving the owner within s. 1 (1) of the Larceny Act, 1916. The Crown put it that it had to rebut a defence of unconscious or accidental detention.

Eustace Fulton for the Crown was not called on.

The LORD CHIEF JUSTICE: The appellant was convicted under the Larceny Act of the larceny, as a public servant, of four plans and five tracings. One plan was of the Irish Office, and the other plans were of other government buildings, the Overseas Department. He was also convicted under the Official Secrets Act, 1911, of retaining the nine plans which he had obtained owing to his position as a person in the employ of a government department. The appeal was based on two grounds, one, that the learned judge misconstrued the Official Secrets Act, and the other that evidence was wrongly admitted. The documents shewed the connexion of the appellant with the Irish Self-Determination League, of the Clapham branch of which apparently he was secretary. The police eventually found a box belonging to the appellant in a house at Brixton, and in it were the plans the subject of the charges. The one which had been most discussed was a tracing of a house at Old

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Queen Street, Westminster, which was the office of the Chief Secretary of the Lord Lieutenant of Ireland. In the box was also a flag which was the Irish Republican flag. At the trial counsel objected to the admission of the documents and the flag as evidence, and asked that they should be excluded. The judge came to the conclusion that the documents and articles were admissible, and gave his reasons. The Court agreed with what Mr. Justice McCardie had said. The only defence was that the plans were inadvertently in the possession of the appellant, but he gave no explanation of his possession of them. It was therefore open to the jury to conclude that the appellant had stolen or retained them for some sinister purpose. The judge admitted the evidence, and the Court thought rightly.

One other point remained about the conviction. It was argued that under the Official Secrets Act the learned judge had come to a wrong conclusion on the interpretation to be given to certain words in sect. 2, sub-sect. 1 (b). It was contended that the subsection related only to plans used in "prohibited places." That was an unsound argument. The language of sect. 2 (1) shews that it relates not only to a plan of a "prohibited place" as defined by sect. 3, but also, *inter alia*, to a plan which a person has obtained owing to his position as a person who holds or has held office under His Majesty, or as a person employed under one who holds or has held office. The learned judge took this view, and the Court agreed with him. The conviction must be affirmed. With regard to sentence the Court could not close its eyes to the facts. No explanation at all had been forthcoming, and it was impossible for the Court to treat the case lightly. It could not regard the sentence as too severe, and it dismissed the appeal both on conviction and sentence.

Appeal dismissed.

Solicitor for Appellant—*J. H. MacDonnell.*

W. E. H.

BEFORE

THE LORD CHIEF JUSTICE, MR. JUSTICE DARLING AND MR. JUSTICE SANKEY.

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29 November.

DOUGLAS WESTLAKE.

Appellant allowed exceptionally to supplement his evidence below, on oath in this Court.

The Court will not permit sentence to run from the date of conviction when the period between conviction and the hearing of the appeal has been prolonged through his mis-statement.

The appellant was convicted at the Surrey Sessions on October 20th, 1920, of obtaining credit by fraud, and was sentenced to nine months' imprisonment with hard labour. He appealed against conviction and sentence, leave having been granted by the Court on November 15th. On November 21st, the case was adjourned to enable him to prove that he had money with which he could have paid the debt during the week in which he obtained credit.

The LORD CHIEF JUSTICE: The points in the case were whether there was evidence that the appellant had obtained credit by fraud, and, secondly, whether there had been proper direction to the jury.

Ernest Williams for the Crown: The circumstances showed a guilty intention, and the appellant had given a bogus cheque in payment for the hire of a motor car on the first day, on the strength of which he obtained the loan of a car on the following day.

Appellant now said that he had written to the police at Bow Street asking them to find a witness who stayed at the Strand Palace Hotel. He (the appellant) had received 45*l*. from the Royal Air Force Pay Office, and was entitled to another 50*l*.

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DOUGLAS WESTLAKE.

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Darling J.
Sankey J.

The LORD CHIEF JUSTICE invited the appellant to go into the witness-box, but warned him that he would be liable to prosecution for perjury if he gave false testimony.

Appellant swore that when he left Uxbridge in July he had 135*l.* in his possession, and when he went to Sutton, where he hired the motor car, he had 85*l.* He betted on horse racing, and when he hired the car he had about 15*l.* on him. He paid the hire with a cheque a man had given him because the man told him he had paid money into the bank to meet the cheque. He had the money with him on the following day when he tried to get the cheque back. In August, he was entitled to 85*l.* from the Royal Air Force, and had received about 35*l.*

Cross-examined by *Williams.*

Flying-Officer George Oliver, called by *Williams:* The appellant joined the Royal Air Force in April, 1918. He went into hospital in September of that year and absented himself in December. In March last he went to Woking and drew 20*l.*, saying that he had just been discharged from hospital. They next heard of him in July, when he was brought by an escort from Pentonville Prison, and he was demobilised forthwith. Except for the 20*l.* and 2*l.* he would receive when demobilised, there was no record of any payment to him. As an absentee he was not entitled to either pay or gratuity.

Detective-sergeant Paine: When I arrested the appellant, only three halfpence was found on him. He had no money when he tried to get back the bogus cheque.

A police-inspector from Bow Street deposed that the man sent for by the appellant was not known at the Strand Palace Hotel.

The LORD CHIEF JUSTICE: The matter had come before the Court on three occasions, and the adjournments were due to statements made by the appellant. The jury came to the conclusion that the appellant had obtained credit by fraud. The appellant's case was that he had been in a position to pay the money and that

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consequently there was no fraud. That Court had given him an opportunity of establishing his statement that he was entitled to a considerable sum from the Royal Air Force. He now told them a fresh story which was inconsistent with his previous story. There was no trace in the evidence at the trial that he had 15*l.* in his pocket when he hired the car and gave the cheque. They had taken the very unusual course of allowing him to supplement his evidence in the witness-box, and they did not believe him. The appeal must be dismissed both on conviction and sentence. It was their usual practice to let the sentence date from conviction, so that an appellant had the benefit of the time during which the appeal was pending; but in that case, as the appellant had obtained adjournments by statements which the Court did not believe, the sentence would date from that day, although the Court had given leave to appeal. Moreover, the papers would be sent to the Director of Public Prosecutions for him to examine and decide whether the appellant should be prosecuted for perjury.

Appeal dismissed.

W. E. H.

JOHN WELCH.

Severity of sentence.

A maximum sentence, semble, *should not be imposed after a considerable interval from the last conviction.*

The appellant was convicted, on 2nd July, 1920, at the Lincolnshire (Parts of Lindsey) Sessions, of larceny, and was sentenced to two years' imprisonment with hard labour.

He appealed against the sentence.

DARLING J.: The appellant was convicted last in 1914, and sentenced to two terms of eighteen months' imprisonment. On other occasions he had been convicted as a rogue and vagabond, and was altogether a very undesirable person. For some years he served in the army, and had committed no crime for five years. The Chairman inflicted the *maximum* sentence. The appellant was fifty-one, and the Chairman had not allowed him the three months' detention during which he had awaited trial. The proper sentence

would be eighteen months' imprisonment, and, as he had been in prison three months, the sentence would be reduced from two years' to fifteen months' imprisonment with hard labour.

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Sentence reduced.

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Severity of sentence.

The appellants were convicted at the Central Criminal Court on 26th October, 1920—Weisberg of receiving and Walvisch of stealing a motor car, and the Recorder sentenced the former to fifteen months' and the latter (who pleaded guilty) to nine months' imprisonment with hard labour.

They appealed against sentence.

Zeffertt for Weisberg, who was present. The sentence was excessive. The Recorder ought not, when evidence of good character was given unchallenged during the trial, to have paid attention to general statements of bad character after trial and before sentence, which the prisoner had no opportunity to meet. The appellant was now only twenty years old and had been brought here from Russia as a baby. In 1916 he joined the British Army, and was demobilised in 1919 permanently lamed. In August last he had a "tiff" with his mother, and, leaving home, had drifted into bad company. Except for this offence, he had an excellent character, which was put in evidence at the trial. After the conviction the Recorder had come to the conclusion that the appellant was the leader of a gang of motor thieves, whereas the lad was really the dupe of an older man.

Both appellants called evidence that they would be given employment if the sentences were reduced.

SANKEY J.: It is perfectly true that Weisberg was a young man and that this was the first offence of which he had been convicted. He had an exceptional character at school, and had

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joined the army. When he left his mother he got out of control and into extremely bad company. They did not think the Recorder had passed an excessive sentence, but that Court had had further evidence of the boy's antecedents. They would have liked to bind him over in order to give him an opportunity of making good, but the case was a serious one. While they did not say that the sentence was wrong, the term would be reduced from fifteen to nine months. As regarded Walvisch, who was older, he also had no previous convictions against him, and he had rendered all the assistance he could to the police. His term would be reduced from nine to six months. Both sentences would date from conviction.

Sentences reduced.

Solicitors for Weisberg: *Osborn and Osborn,*

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Pledging or selling goods received under a contract within the Sale of Goods Act, 1893, and not paying the original vendor for the goods, is not necessarily a criminal offence within s. 20 (1), iv, a, of the Larceny Act, 1916, or larceny by a bailee.

The appellant was convicted at the Central Criminal Court on 3rd November, 1920, of larceny as a bailee and fraudulent conversion of property, after a trial lasting five days, and was sentenced by the Common Serjeant to six months' imprisonment in Division II.

He appealed against conviction and sentence on certificate granted. The Court, on 9th November, admitted him to bail (Mr. Justice Roche having refused the application, and after hearing counsel for the respondent in opposition) on his own recognisance in 200*l.* and those of two sureties in 100*l.* each; the application was made on the ground that his business might be ruined in the interval.

Sir Richard Muir (with him *G. D. Roberts*), for the appellant. Scranton was tried for five days in respect of four transactions, the charges being both larceny and conversion. He was

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found guilty in respect of some of the transactions and not guilty in respect of others. He was sixty-one years of age and an American citizen. He came to this country in 1913, and was a man of excellent character. By occupation he was a music-hall agent. He was carrying on a perfectly honest and very prosperous business, and, in addition, he sold jewellery to the artistes and other persons with whom his occupation brought him in contact. That was also a prosperous business. Unfortunately, he engaged in betting, which continued from 1916 till 1919, with the result that, in 1920, having borrowed sums of money from money-lenders and having been allowed a large overdraft by a bank, he became bankrupt, with liabilities of some 67,000*l.* and only 145*l.* assets. The bulk of his indebtedness was to money-lenders. In June, 1919, he had occasion to visit the Coliseum, and so became acquainted with the prosecutors, Walter Davies and Sons, jewellers and pawnbrokers, of St. Martin's Lane. He purchased from them a ring, and paid 250*l.* cash for it. In conversation with Mr. Merritt, the salesman, he said that he did business with artistes, and Mr. Merritt thereupon offered to let him have jewellery on "appro." Appellant gave his bankers and Sir Oswald Stoll as references, and these the prosecutors took up. Between June and December, 1919, articles of the total value of 19,696*l.* were entrusted to him on sale or return. He paid for a considerable quantity before 30th October, and returned others. Thus he paid for, or returned, articles to the value of 16,029*l.* The balance of 3,665*l.* was the value of goods included in the indictment. For part of those goods, post-dated cheques, subsequently dishonoured, were taken, but the prosecution had withdrawn the charges relating to them, and relied upon five articles valued at 2,160*l.* These were the subject of four transactions on 30th October, 14th November, and 10th and 12th December. Counsel for the prosecution decided that he would ask the jury to say that the offence was that of larceny as a bailee, and not larceny by a trick, and he (*Muir*) contended that it could not be a felonious conversion and a conversion which was the subject of misdemeanour by the same statute, but did not think it necessary to argue that point. All the goods were delivered on "appro" notes, in the same form, with a printed footnote that the goods were the property of Davies and Sons till they received payment in cash.

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Counsel cited *Kirkham* v. *Attenborough*, 1897, 1 Q. B. 201, where a man who had goods on sale or return pledged them, and it was held that the act of pledging was a determination of the original ownership, and that he passed a good title to the pawnbroker. The act of pledging could not be theft.

[DARLING J.: The Sale of Goods Act, s. 17 (*a*), shows that due regard must be had to the terms of the contract, the conduct of the parties and the circumstances of the case. The conduct of the parties in the present case was that the prosecution allowed the things to be sold and gave a running credit.

The LORD CHIEF JUSTICE: What are the points upon which you are appealing?]

Muir: There was no real ground, no real evidence, upon which the jury could find that there was conversion, either felonious or unlawful, of goods. Further, there was no evidence of an intent to defraud; therefore the evidence was unsatisfactory, and the verdict cannot stand.

[DARLING J.: Your case is that the burden of proof was on the prosecution that the conversion was felonious or with intent to defraud, and this was not proved.]

Muir: Yes, and that was the impression on the mind of the Common Serjeant. It was perfectly obvious from his summing-up that there was no evidence in support of pledging or selling to money-lenders, and he thought the jury had been misled.

Sir Ernest Wild, K.C. (with him, *S. Duncan*), for the respondent. There was evidence, apart from the charges of larceny, that the appellant pledged the goods or parted with them to money-lenders; and that was evidence of fraudulent conversion.

(*a*) S. 17 (1): "Where there is a contract for the sale of specific or ascertained goods the property in them is transferred to the buyer at such time as the parties to the contract intend it to be transferred.

(2) "For the purpose of ascertaining the intention of the parties regard shall be had to the terms of the contract, the conduct of the parties, and the circumstances of the case."

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The proposition of the defence was that the approval note was ignored owing to the course of conduct of the parties. The case therefore came within *Kirkham* v. *Attenborough*, and not *Weiner* v. *Gill*, 1905, 2 K. B. 172; 1906, 2 K. B. 574: C. A.

[The LORD CHIEF JUSTICE: When you are dealing with a section of law it is not the same as fraudulent intent. What we are looking at is that we are a final court of appeal, and we have to say whether the evidence is satisfactory upon the whole that the verdict should stand of conviction of a crime with the following sentence. We have to see what is the evidence of fraudulent intent, and that apart from the Sale of Goods Act and the Larceny Act.]

Wild: What is put by my friend is that even supposing the property had become the appellant's by his dealing with it in any way, it did not matter whether it was fraudulent or not, whether pledging with money-lenders or paying money-lenders or not; if that is the proposition put against the respondent, I am entitled to argue it. There was evidence for the jury to come to the conclusion that the property did not pass to the appellant and that he had either to return the goods or pay the money. If the disposal was dishonest, the nice point of law comes in.

[The LORD CHIEF JUSTICE: What we have in mind is not the law at all; we are putting that on one side. Whatever this man's offence was there must first be proper evidence, sufficient evidence, that his intent was fraudulent. *Primâ facie* the man is innocent, and what we have to see is, is it proved sufficiently that this man's dealings were fraudulent?]

Wild agreed that the evidence did not satisfy the Common Serjeant, but the jury took an hour and twenty minutes to consider their verdict. There was not only evidence, but strong evidence, that the appellant fraudulently disposed of these goods to money-lenders to pay his gambling debts. Both in *Kirkham* v. *Attenborough* and in *Weiner* v. *Gill* the question was whether the original owner could recover from third parties, and the latter case was like the present one. There was a question for the jury under s. 17 of the Sale of Goods Act. The Common Serjeant has stated in his certificate that the jury might have found their verdict

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of "guilty" because, although appellant, when closely cross-examined, strongly denied that he had sold the jewellery to money-lenders, the jury probably acted on the assumption that the suggestion was true. Counsel contended that appellant would not say to whom he had parted with the goods because they had gone to money-lenders who had returned them to him.

The LORD CHIEF JUSTICE: The appellant was convicted on three counts of an indictment which charged him with fraudulent conversion of property under s. 20, sub-s. 1 (iv) (a) (*b*), of the Larceny Act, 1916, and for larceny. He was in business as a music-hall agent, obtaining engagements for artistes. Walter Davies and Sons, the prosecutors, were jewellers and dealers in precious stones. They entered into business relations with the appellant and apparently delivered to him a number of articles of jewellery accompanied by a printed document which was headed "Sale or Return." It described the articles and stated the value, and had the footnote, "It is agreed that the property in the above goods shall not pass except on payment to us in cash of the price thereof." A large amount of jewellery was entrusted to the appellant on sale or return, and, before 30th October, he had paid for some and returned some. There was a balance of 3,665*l*., value of goods, and the appellant gave post-dated cheques for part of them, but the case with regard to these cheques was abandoned, the prosecution not pressing that part of the indictment, as the Common Serjeant had some doubt about it. That disposed of eleven out of sixteen articles, and only five were left, amounting in value to 2,160*l*., which were the subject of the conviction. There had been large transactions between the appellant and the prosecutors; they trusted him with large sums of money. For the prosecution the case made was that the contract was in the printed document and nowhere else, and that consequently the property in the goods remained in Davies and Sons, and never became the property of the appellant until he paid cash for them. The evi-

(*b*) S. 20 (1) iv, a: "Every person who being entrusted either solely or jointly with any other person with any property in order that he may retain in safe custody or apply, pay, or deliver, for any purpose or to any person the property or any part thereof or any proceeds thereof . . . fraudulently converts to his own use or benefit or the use or benefit of any other person, the property or any part thereof, or any proceeds thereof . . . shall be guilty of a misdemeanour."

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dence established that there had been correspondencee which, beyond all question, showed that the appellant was dealing with goods without paying cash for them to Davies and Sons, and that he was selling the goods and handing them over to the purchasers, the relations between him and the prosecutors being those of debtor and creditor. It was said that these were separate transactions in which separate arrangements were made, but some of the payments by the appellant to Davies and Sons were not in respect of one article, but amounts which were due for articles disposed of at different dates. There was evidence that Davies and Sons knew that their goods were being sold and disposed of without the money being handed over.

The appellant said it was true that there was this printed note, but that it was never acted upon, and that it was not really the contract. Reliance was placed by the prosecution on s. 18, r. 4 (*c*), of the Sale of Goods Act, 1893, for the purpose of showing that when goods are delivered to the buyer on sale or return, the property passes when he expresses his approval. S. 17, however, enacts that when there is a contract for sale, the property is transferred when the parties intend it to be transferred, having regard to the terms of the contract, the conduct of the parties and the circumstances of the case. They had come to the conclusion that it was not established that the true contract was the contract in the printed note. It was established that the intention of the parties was that there should not be a rigid adherence to the note. The note was intended for the civil courts, and afforded some protection to the owners of property, but in criminal cases it was somewhat different. Under s. 17 of the Act they came to the conclusion that the appellant was entrusted with the goods on the terms that he could become the owner of the goods

(*c*) S. 18: "Unless a different intention appears, the following are rules for ascertaining the intention of the parties as to the time at which the property in the goods is to pass to the buyer:—Rule 4. When goods are delivered to the buyer on approval or 'on sale or return' or other similar terms, the property therein passes to the buyer: (a) When he signifies his approval or acceptance to the seller or does any other act adopting the transaction. (b) If he does not signify his approval or acceptance to the seller but retains the goods without giving notice of rejection, then if a time has been fixed for the return of the goods on the expiration of such time, and if no time has been fixed, on the expiration of a reasonable time. What is a reasonable time is a question of fact."

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by adopting them as his own and thus becoming the debtor of Davies and Sons for the amount.

In those circumstances, they had to look at what took place at the trial. The direction of law by the learned Common Serjeant had been careful and was unimpeachable. It was called at the Bar a summing-up for an acquittal. Yet the jury convicted. Then the Common Serjeant granted his certificate that a material element in the case was whether the appellant had parted with the goods to money-lenders—(it appears that the jewellery had not been traced)—also on the ground of the unsatisfactory nature of the evidence. That was an indication from the Common Serjeant that he thought the verdict was unsatisfactory, having regard to the nature of the evidence. The judge's view, by itself, did not entitle that Court to set aside the verdict, but it was an element to be taken into consideration. They had stated that in *W. Hart,* 10 Cr. A. R. at 178: 1914, and in other cases. Sir Ernest Wild had said that the prosecution had proved the case and that the defendant could not show any honest disposal of the property. They had examined the evidence, and the conclusion to which they had come was that the evidence was really very finely balanced in that case. They could not, on reviewing the whole of the evidence, really conclude that it was not consistent with the evidence of the appellant. They thought it was one of those cases in which the Court was not only entitled but was bound to exercise the powers conferred upon it by the Criminal Appeal Act, s. 4, which said that the Court shall allow the appeal if they think the verdict should be set aside on the ground that it could not be supported, having regard to the evidence. They had had on numerous occasions to consider that matter, and the conclusion to which they had come in this case was that the evidence was not satisfactory to support conviction. Reviewing the whole of the case, carefully surveying the whole of the evidence, and bearing in mind the views of the Common Serjeant, they thought the verdict ought not to stand. The appeal would accordingly be allowed and the conviction quashed.

Conviction quashed.

Solicitor for the Appellant—*Julius A. White;* for the respondent—*J. R. C. Bathurst.*

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HENRY EVANS AND JOSEPH PRITCHARD.

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A judge is not entitled to insist on the jury returning a verdict against each or any one of several co-defendants if the jury state that they are unable to agree about any one.

Observations on the composition of mixed juries of men and women.

Appeal against conviction and application for leave to call further evidence.

Appellants were convicted, together with George Hughes (who did not appeal), on November 4th, 1920, at the West Bromwich Quarter Sessions, of breaking and entering a dwelling-house and stealing money therein, and on November 5th the Recorder sentenced Hughes to twelve months' imprisonment with hard labour, to be followed by two years' police supervision, and Evans and Pritchard each to eight months' imprisonment with hard labour.

Leave was given to call Hughes as a witness for appellants. He swore that he alone was guilty of the housebreaking and larceny, and the two appellants were not concerned in it and took no part in it.

A. F. Clements for Evans, who was present. The trial took place before a mixed jury of men and women (six of each); it began at 3 p.m. and ended at 8.20 p.m. The jury retired to consider their verdict and returned into Court at 9.45 p.m., and stated that there was no chance of their agreeing about two of the prisoners, but they were prepared to give a verdict with regard to one of the three. The learned Recorder was guilty of a serious misdirection in telling the jury he could not take a verdict about one prisoner only. He told the jury that they must return a verdict in the case of all three—they were at liberty to find them all guilty or all innocent, or two guilty and the other man innocent, or all of them innocent if the case was not proved to their satisfaction, but he could not accept a verdict with regard to one only. This was clearly wrong in law—if the jury could not agree about two of the prisoners they had the right to say so, and to be discharged from giving a verdict with regard to them. The learned Recorder again told the jury he could not accept a verdict as against one, and requested them to retire again to consider their verdict. The jury thereupon asked that the evidence

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of Evans should be read over to them again, and the Recorder requested the shorthand writer to read this evidence from his notes, but instead of reading the evidence of Evans, the shorthand writer read out the evidence of another witness named Powell. The jury, after receiving these directions from the learned Recorder, and after hearing the evidence of Powell read over, retired again and returned into Court at 10 p.m. with a verdict of guilty against all three prisoners. He submitted that the trial was unsatisfactory.

Kenelm Preedy for Pritchard (under s. 10 of the Criminal Appeal Act), who was present, said that his first point was that no offence as laid in the indictment was proved. His client had been charged with stealing nine pounds in gold, ten pounds in silver and twenty Treasury notes of one pound each, and no evidence had been given that the cash box contained what the indictment alleged. The prosecutor Taylor stated that he did not know what the cash box contained, but he knew there was money inside to the amount of 39*l.* at least; no other evidence was called to prove the contents of the cash box. Though it might have been open to the prosecution to charge the prisoner with stealing a certain amount of money, they did not do this, and no application to amend the indictment was made, and the indictment was never amended. The Recorder in his summing-up stated that there were twenty 1*l.* notes taken from this box, but there was no evidence that twenty 1*l.* notes were ever in the box.

He was stopped.

Roland Oliver for the Crown.

The information about the contents of the cash box was supplied by the wife of the prosecutor, but she was not called as a witness. When the prosecutor was asked whether he could speak of his own knowledge about the contents of the cash box, he said no, but his wife knew, and he added that he knew that it contained over 39*l.*, the week's takings from the shop. It is obvious that the takings must have consisted of silver and Treasury notes. No objection was taken at the trial that no proof had been offered that there were exactly twenty 1*l.* notes in the cash box. Appellants' counsel appeared to have acquiesced in the assumption that the cash box contained Treasury notes.

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The LORD CHIEF JUSTICE: These two appellants were convicted at the West Bromwich Quarter Sessions, together with a man named Hughes, of housebreaking and larceny, and were each sentenced to eight months' imprisonment with hard labour. Hughes was sentenced to twelve months' hard labour, to be followed by two years' police supervision, and had not appealed. The appellants had been allowed to call Hughes before the Court as a witness on their behalf, and he had told the Court that the appellants had nothing to do with the crime. It was obvious that he had told many untruths in his evidence, and no reliance could be placed on his statements, and we must discard his evidence altogether when it is contradicted by the other witnesses at the trial. But there is some substance in the objection urged against the directions given to the jury by the learned Recorder when they first returned to Court after considering their verdict. The trial began about 3 p.m. and proceeded until 8.20 p.m., the jury then retired to consider their verdict, and returned into Court about 9.45 p.m. and informed the Recorder that they had agreed about one prisoner, but they could not agree, and there was no likelihood of their agreeing, about the other two. The Recorder thereupon told the jury that he could not accept their verdict on one prisoner only, they must give a verdict on all the prisoners, they must say with regard to each of the three whether he was guilty or not guilty. He was clearly wrong there—the jury were entitled to disagree about one or two of the prisoners, if the fact was they were unable to come to an agreement. The result of this direction was that the jury retired again and returned into Court about fifteen minutes afterwards with a verdict of guilty against all three prisoners. We are not satisfied with the course of this trial, and we consider the verdict unsatisfactory having regard to the circumstances, and it ought not to be allowed to stand. The convictions against both appellants must be quashed.

Convictions quashed.

Solicitors for the Appellant, Evans—*Hyman, Isaacs, Lewis and Mills*, Agents for *Hatwell, Pritchett and Co.*, Birmingham.

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The LORD CHIEF JUSTICE: In *R.* v. *Evans and Pritchard*

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(above) I alluded to the fact that the jury was composed of six men and six women, and I made some remarks about the process of selection which appears to have been adopted in that case. It was stated to us that two boxes were there used, one containing the names of the women on the panel, the other containing the names of the men; and that the officials took one name from one box and one from the other box until a jury of six women and six men were chosen. I pointed out that this was not the proper way to select a mixed jury in criminal cases, and I directed attention to Rule 3 of the Women Jurors (Criminal Court) Rules, 1920, which shews plainly that the number of women on a panel of jurors should be in the same proportion to the number of men as the total number of women is to the total number of men on the jurors' book. When once the panel has been selected according to this rule, the jury must be selected in the ordinary way and not as was done in the case referred to. There is no rule which states that the number of men and women serving on a jury shall be equal, and I wish to make it clear that the names of the men and of the women on the panel must not be placed in two separate boxes and drawn alternately; they must be placed in one box and drawn indiscriminately, until the jury is made up.

F. P. F.

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JOSEPH HERBERT SKINNER.

A false declaration may amount to a false pretence, if, though by itself nothing was obtained, it formed an indispensable part of a series of documents without which nothing could have been obtained.

Severity of sentence.

Appeal against conviction and sentence.

Appellant was convicted on October 21st, 1920, at the Liberty of Peterborough Quarter Sessions, on the charge of obtaining 2*l.* 6*s.* 11*d.* by false pretences, but was recommended to mercy by the jury. The Acting-Chairman sentenced him to nine months' imprisonment with hard labour, but on the next day, in order to give effect to the recommendation of the jury, reduced the sentence to six months' imprisonment with hard labour.

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J. N. Emery for appellant (who was present) contended that according to the evidence no money had been obtained as a result of any false pretence. Assuming that there was a false statement in a document of January 7, 1920, appellant did not obtain any money by means of that document. The money that he obtained was paid to him in consequence of the order made in November, 1919, that he was to have a grant at the rate of 24*l.* per annum for six months, and not in consequence of any statement in the document of January. When the grant was made for the six months, a form was sent to him each month, which he had to pass through a bank, and the signature of appellant on each of these forms had only the same effect as an indorsement on a cheque, and no money was obtained as a result of any statement in the form. It was proved that in some cases the monthly payments were made on presentation of the signed forms, although the blank spaces were not filled in.

The Acting-Chairman ought to have withdrawn the case from the jury as there was no evidence on which they could convict appellant. The sentence was too severe—the appellant had hitherto borne an irreproachable character—he had served in the Post Office at Peterborough since January, 1901, at the outbreak of war he held the rank of sergeant in the Territorials, during the war he served with distinction both at home and abroad, and received a commission on February 3rd, 1918. After this he served in Belgium and in the army of occupation in Germany. He was demobilised on October 10th, 1919, after over five years' service, suffering from neurasthenia, dysentery and complications of other diseases, and, according to the Medical Board, his percentage of disability was 70 per cent.

He was strongly recommended to mercy by the jury, and yet the sentence passed on him for obtaining the sum of 2*l.* 6*s.* 11*d.* by false pretences was nine months' hard labour, reduced on the next day to six months' hard labour.

Pocock, for the Crown, was not called upon to support the conviction. On the question of the alleged severity of the sentence he was not instructed to say anything, but left the matter to the discretion of the Court.

SANKEY J.: The appellant was convicted of having obtained

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on January 7th, 1920, from His Majesty's Paymaster-General, the sum of 2*l*. 6*s*. 11*d*. by false pretences, and was sentenced to six months' hard labour, and he now appeals against conviction and sentence. For some time before the beginning of the war, appellant was employed in the Post Office at Peterborough. He served in the army throughout the war, and was demobilised in October, 1919, and was granted a disability pension and a gratuity. On November 26th he applied for a supplementary pension on a form (Exhibit 1), in which he stated that he was not then in employment, his total income from all sources was 87*l*. 10*s*., and that he did not hold any situation of profit under the Crown. A supplementary pension was granted at the rate of 24*l*. per annum for six months, and every time he drew an instalment he had to sign a form (Exhibit 3), stating that his income from all sources was the same, and that his circumstances were the same, as when the supplementary pension was granted. He filled up one of these forms on January 7th, 1920 (Exhibit 3), and thereby obtained the sum of 2*l*. 6*s*. 11*d*., being the amount for the period November 26th—December 31st, 1919. Counsel, in the course of argument, admitted that unless appellant had signed that document, he could not have obtained the January payment. In that document there is a declaration by appellant that his private income from all sources was then the same as when the supplementary grant was made in November, and that his circumstances were in other respects the same. The fact is that since the grant was made in November the appellant had been placed on sick pay, and every week a payment was being made to the appellant's wife in Peterborough in respect of his situation of profit under the Crown as a clerk of the Post Office. If he had not been still in the employment of the Post Office, neither he nor his wife would have been entitled to draw anything in respect of sick pay. Counsel contended that appellant did not obtain any money by means of signing this form: the appellant was entitled to the money in consequence of the grant made in November, and confirmed by a letter received by him from the Ministry of Pensions on Jan. 5th, and the signature to this form was not any representation about any state of facts, but was a purely formal signature such as is required in indorsing a cheque or signing a dividend warrant. We cannot accept this argument. It is admitted that the money could not have been obtained without signing this

declaration, and the declaration means what it says. There is therefore no ground for disturbing the conviction, but with regard to the sentence we are impressed with the previous record of the appellant and the recommendation of the jury, and as the appellant has been in prison since August 27th we think we are rightly interpreting the views of the Acting-Chairman which he expressed on the second day (October 22nd) if we reduce the sentence of six months' hard labour, to six weeks' hard labour, and the result is that appellant will now be entitled to his immediate discharge.

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Sentence reduced.

Solicitor for Appellant—*J. Hunt,* Peterborough.

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BEFORE

THE LORD CHIEF JUSTICE, MR. JUSTICE BRAY AND MR. JUSTICE SHEARMAN.

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THOMAS FENLEY.

If leave to appeal against sentence is obtained by misrepresentation, sentence will not run from the date of conviction.

Appeal against sentence.

Appellant was convicted on November 12th, 1920, at the London Sessions, of larceny from the person, and was sentenced to four years' penal servitude, leave to appeal against sentence (only) having been granted on December 6th by the full Court.

Appellant had stated that he had served with his Majesty's Army in France and had been severely wounded.

Appellant in person.

THE LORD CHIEF JUSTICE: Inquiry has now been made about the appellant's record in the army, and his statements are found to be quite untrue. It is plain that the leave of the Court for this appeal was obtained by deliberate misrepresentation on the part of the appellant.

In ordinary circumstances when leave to appeal is given, the sentence is allowed to run from the date of conviction. But in view of appellant's false statements, the ordinary course will not be followed here, and the time during which appellant has been in custody pending appeal will not be allowed to count as part of the term of sentence.

Appeal dismissed.

F. P. F.

CHARLES ALBERT BATES.

1920
13 *December.*

Reading
L.C.J.
Bray J.
Shearman J.

Severity of sentence.

Appeal against sentence.

Appellant pleaded guilty at the Warwick Assizes on November 16th, 1920, to charges of larceny and forgery, and was sentenced by Mr. Justice Sankey to five years' penal servitude.

At appellant's request five other charges against him were taken into consideration by the learned judge in passing sentence; all these charges were for larceny.

Appellant in person.

The Court reduced the sentence to eighteen months' imprisonment with hard labour. This was done on the ground of his youth (he being twenty-one years of age), and also on the ground that his previous record only showed one offence (in 1917) of larceny, for which he served one month's imprisonment, and one offence when he was serving in the army.

Sentence reduced.

F. P. F.

BEFORE

THE LORD CHIEF JUSTICE, MR. JUSTICE DARLING, AND MR. JUSTICE SHEARMAN.

1920
20 *December.*

LOUIS SCHULTZ.

Severity of sentence.

Appeal against sentence.

Appellant pleaded guilty on 23rd November, 1920, at York Assizes, to an indictment for perjury, and was sentenced by Swift J. to six months' imprisonment.

H. T. Kemp, K.C. (with him *Arthur Morley*), for the appellant, who was not present. Appellant had acted wrongly in trying to help his father when summoned before the Hull magistrates for riding a motor-cycle without a licence. He was a young man of twenty-six years of age, in business as a pawnbroker, and had borne an irreproachable character, and did not realise the gravity of the offence of perjury. Filial affection had led him to attempt to shield his father.

The LORD CHIEF JUSTICE: Courts cannot regard perjury as a trivial offence. The sole point is whether the sentence is too severe.

Kemp urged in mitigation the appellant's meritorious army service during the war. He was gassed in April, 1918, with the result that he was detained in hospital for about three months. There was strong local feeling in favour of appellant, and a petition had already been signed by 2,500 persons praying for a remission of sentence. Two Members of Parliament for Hull had interested themselves on his behalf. He hoped that the Court would not treat a young man of hitherto blameless life as an ordinary criminal.

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LOUIS SCHULTZ.

Darling J.

DARLING J.: We are, in effect, asked to say—what the learned counsel urged at York—that the appellant should be bound over. The judge of assize had rejected that request for a very good reason. Daniel Schultz, the father of appellant, was charged with riding a motor-cycle without a licence, and if he had confessed his guilt and paid a small fine the matter would have ended. Instead of that he called his son Louis (the appellant) to say that he (the father) could not ride a motor-cycle and was not out on it on the day in question. Eventually, when the police brought further evidence, the father pleaded guilty.

We are asked to say that this was a venial offence. We cannot do that. The learned judge, who had before him the previous good character of the appellant, was right in passing the sentence imposed. The sanctity of the oath is the only means which Courts of justice have of doing right between citizens, and if one side were to be allowed to call perjured evidence, with the knowledge that those giving it would be lightly punished, great injustice would be done and the ends of justice defeated.

The only difference which the Court makes in this case is to order that the sentence of six months' imprisonment be served in the second division, as we regard the appellant as a proper person to be segregated from habitual criminals.

Sentence to be served in second division.

E. A.

Solicitor for Appellant—*G. S. Williamson*, Hull.

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20 & 21
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Reading
L.C.J.
Darling J.
Shearman J.

FREDERICK WHITE HOLDICH.

The Crown Office Act, 1877, 40 & 41 *Vict.* c. 41, *does not authorise the addition of names to a Commission of Oyer and Terminer or of Gaol Delivery, and no mere Commission to act as a Justice of the Peace can confer the jurisdiction of these Commissions.*

Conviction quashed as being coram non judice, *some of the convicting justices sitting only by virtue of their names being added after the demise of the Crown issuing a Commission, to a schedule in that Commission.*

Appeal against conviction on law.

Appellant was convicted, on 22nd October, 1920, at the "Court of Quarter Sessions, Oyer and Terminer and Gaol Delivery for the Liberty of Peterborough," of perjury, and sentenced to six months' imprisonment with hard labour and to pay the costs of prosecution.

At the trial *Sir E. Wild, K.C.* (and *Elborne*), took objection to the jurisdiction, but were overruled.

Sir John Simon, K.C. (with him *Sir E. E. Wild, K.C.*, and *S. L. Elborne*), for appellant, who was on bail.

Counsel dealt with the origin of the ancient charters [see Note, p. 127] conferring upon the Abbot of Burgh St. Peter the right to appoint certain judicial officers within certain territorial limits, which right had been expressly and deliberately cut down by Hen. 7 in the year 1493.

Beyond the points of geographical and antiquarian interest, the precise point [as appears from the judgment] was that the appellant asked the Court to say that the Court of Peterborough Sessions which tried him was not properly constituted and did not possess the powers or jurisdiction which it claimed, because the Justices who sat, one of whom was the Chairman, were not sitting by virtue of a valid commission. The Justices claimed jurisdiction by virtue of Commissions issued on March 29th, 1878. On that date three Commissions were issued to them, viz.:—the ordinary one of the Peace and those of Oyer and Terminer and of Gaol Delivery. The names of the Justices were placed in a schedule [under s. 3, proviso (2) of 40 & 41 Vict. c. 41 (*a*)], and when a

(*a*) "Whenever convenient, the enumeration of Acts of or Bills in Parliament, of names of persons or other matters shall be contained in a schedule

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new Justice was appointed subsequently, his name was added to the schedule of each Commission. The power to do this in a Commission of the Peace was given by the Crown Office Act, 1877 (above), and the Rules made thereunder. Whether that statute or the Demise of the Crown Act, 1901, 1 Ed. 7, c. 5 (*b*), authorised names to be added even to the Commission of the Peace after the demise of the granting sovereign might be doubted—*i.e.* whether the Crown Office had authority to add names to the schedules of Oyer and Terminer and of Gaol Delivery after sealing and without resealing on the addition of each and every name—but the Act of 1877 certainly did not authorise the subsequent addition of names to Commissions of Oyer and Terminer and of Gaol Delivery. Names could not, therefore, have been added to these two Commissions even in the reign of Queen Victoria—*à fortiori* not in subsequent reigns to Commissions granted by her.

Now, three of the Justices, including the Chairman, who convicted in this case, were added after Her late Majesty's reign. Hence they had no power to try perjury, which was reserved from Quarter Sessions. No power whatever had been conferred upon them of sitting in or holding a Court of Oyer and Terminer or of Gaol Delivery. They had no power, he submitted, to try the appellant.

Schiller, K.C. (with him *S. M. Everard*), for the respondents (the Peterborough police), argued that the Justices in question were validly appointed, and that being so, it necessarily followed that under the Royal Charters (*temp.* Edw. 3, Edw. 4, and particularly the grant of Hen. 7 in 1493) granting definite rights to the Abbot of Burgh St. Peter, once a Justice had been appointed and his name inscribed upon the Commission of the Peace for the Liberty of Peterborough, he could exercise all the powers of a person duly appointed by the Crown under Commissions of Oyer and Terminer and of Gaol Delivery. In 1878 and before, Com-

or schedules, and in particular in the case of Commissions of the Peace, the names of the justices shall, so far as seems to Her Majesty convenient, be placed in a schedule with space for additions to be made of the names of justices to be appointed after the issue of such Commission."

(*b*) "The holding of any office under the Crown, whether within or without His Majesty's dominions, shall not be affected, nor shall any fresh appointment thereto be rendered necessary by the demise of the Crown."

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missions drawn in the same terms as the ordinary Judges' Commissions of Oyer and Terminer and of Gaol Delivery. The Crown Office from time to time adds or takes off names from the three Commissions (including the Justices') under s. 3, proviso 2. By letters patent of Edw. 7, February 15th, 1901, it was ordered that new Justices of the Peace could be appointed by properly adding their names to Queen Victoria's Commissions of the Peace.

E. A.

The LORD CHIEF JUSTICE (*c*): The appellant was convicted of perjury at the Peterborough local Court, and was sentenced by the Chairman to six months' imprisonment with hard labour. The appeal against the conviction is upon one ground, which is that the Court that tried the appellant for perjury had no jurisdiction to try an indictment for perjury. There is no doubt that a Court of Quarter Sessions has no power to try an indictment for perjury. I need not go further back than to refer to sect. 10 of the Perjury Act of 1911, which expressly enacts it.

It is quite true that this Act was a Consolidating Statute, but further it becomes clear that a Court of Quarter Sessions includes the Justices of any Liberty. The Court constituted was a Court of Justices of the Liberty of Peterborough. There is certainly room for argument, and it may not be saying too much to say for some doubt about the extent of the Liberty of Peterborough, and of the jurisdiction which would be conferred territorially upon the Justices of the Peace appointed for the Liberty of Peterborough.

We have not to decide that question, we have not the material before us upon which we could pronounce. We have not even the fact found in which hundred the offence was committed, and it is therefore sufficient for us to say that we do not pronounce any view upon this part of the case which has not been argued out—once it becomes clear that the material is not present before us for the purpose of determining this question.

The point that has been insisted upon is that the Court that sat to try this case cannot show jurisdiction to try it. The challenge has been to produce any Commission or any authority which

(*c*) This judgment is printed from a transcript of a shorthand note supplied by the courtesy of the Director of Public Prosecutions.

would confer power upon this court of Justices of the Peace for the Liberty of Peterborough, constituted as it was on this occasion, to try the indictment for perjury; and in view of the very interesting and antiquarian questions that are raised by part of the argument in this case, it is very necessary that our decision should be confined to the precise point, and the facts giving rise to it in this case.

Sir John Simon has contended on behalf of the appellant that this court was not properly constituted, and had not the jurisdiction to try the indictment for perjury because the Justices who constituted it were certainly, as regards three of their number, one of those three being Chairman, Justices of the Peace who were appointed under a Commission issued in the reign of Queen Victoria, and that the appointment of these three Justices, including the Chairman, were appointments made within the last few years, certainly after the demise of the sovereign Queen Victoria; and as no Commission can be produced appointing since that date, it is said that although it may be they had power to sit and act as Justices of the Peace, notwithstanding that no Commission had been issued in the reign of the present Sovereign, nevertheless it is strenuously contended that, even assuming that, the appointment of these gentlemen as Justices of the Peace could not confer upon them the power to sit as a Court of Oyer and Terminer or of Gaol Delivery, and must be restricted to the ordinary powers conferred upon a Justice of the Peace.

It is obvious from an examination of the Commission of the reign of Queen Victoria which has been produced, and contains the names of the three gentlemen in question, including the Chairman, that no greater powers are given in terms by that Commission than are ordinarily given to Justices of the Peace. They are appointed for the Liberty of Peterborough in the ordinary way, and there is no power conferred upon them of sitting in Oyer and Terminer, or of Gaol Delivery. This is a very grave objection.

The answer that counsel has made is that once it is established that these gentlemen are properly appointed Justices of the Peace for the Liberty of Peterborough, it necessarily follows from an examination of the documents containing the grants, particularly the grant of 1493 in the reign of Henry the Seventh to the Abbot of the Burgh St. Peter, that there is power in these Justices, once appointed as Justices of the Peace, to do all that

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any person appointed under Commissions of Oyer and Terminer and of Gaol Delivery could perform.

We do not think that this is a right view. The mere appointment of Justices of the Peace, we will assume regularly, by virtue of the provisions under the statute of 1877, and the Statutory Rules and Orders passed thereunder, does not carry with it the power of sitting as a Court of Oyer and Terminer, or to make Gaol Delivery. That these powers could lawfully be conferred upon a Justice of the Peace of the Liberty of Peterborough does not imply that they are lawfully conferred by the mere appointment under the Commission as Justices of the Peace. The Crown did apparently make appointments; it is not quite clear how the right was surrendered, and again became vested in the Crown after the grants had been made; but the Crown undoubtedly did make appointments. Three Commissions are produced to us, one appointing as Justices of the Peace, which we have already referred to; another Commission of Oyer and Terminer; and another of Gaol Delivery. The Commission of the Peace we have already dealt with, and it derives its special importance and significance and effect—notwithstanding that no other Commission has been issued by either of the two succeeding Sovereigns—from the Statute and the Rules.

But there is no such Statute applicable to the Commissions of Oyer and Terminer, and of Gaol Delivery, and it is apparent that those Commissions do not last for ever; that they have become obsolete in the sense that they have no longer any effect, and apparently none have been issued since the demise of Queen Victoria, that is no Commissions of Oyer and Terminer and of Gaol Delivery.

If that is so, whence is the authority derived? It certainly is not to be found in the grant of 1493, to which we were referred. It is quite true, as counsel contended, that there was a grant by the then Sovereign to the Abbot of the power to appoint Justices of the Peace, who should, when appointed for that purpose, have the power, I will assume, to sit in Court of Oyer and Terminer and Gaol Delivery. We do not decide it, we will assume that is so, but even so, it does not carry the case the length that was necessary for counsel's clients, because we should have to find, in order to make this point good, that the power to the Abbot to appoint a Justice of the Peace was the same as the appointment by the Abbot of the Justice of the Peace for the particular purpose.

It is only necessary to state that to see clearly that that cannot be so, the Abbot had the power to appoint, we will assume—we will not say "no doubt," because the question may hereafter arise, but we will assume he had it. It must be exercised before the Justices can get this special power of sitting in the Court of Oyer and Terminer and of Gaol Delivery.

This question is of real importance because the argument assumes that the Court so constituted with the three Justices, including the Chairman, appointed as we have already described, would have the power to sit and try a case of murder, as well as a case of perjury. We have to look very closely to see whether there was any such power granted to this local court, and in view of the absence of any authority which satisfies us, and having regard to all the facts and documents which have been brought before us, we come to the conclusion that in this case the court was not properly constituted. The Chairman who presided at the trial and directed the jury upon the law and summed up the evidence to them, and passed the sentence was not, in the view that we have formed, a Justice properly appointed with the power of sitting in the court of Oyer and Terminer, or of Gaol Delivery, and therefore had no power to sit in a court trying an indictment for perjury. The same observations will apply to the two other Justices to whom reference has been made.

Having regard to the constitution of the Court on this occasion, it becomes impossible to say that the appellant has been tried by a court properly constituted, and in these circumstances there is no alternative for us but to quash this conviction, and the judgment and sentence pronounced upon it. Any costs of the prosecution paid will be returned.

Conviction quashed.

Solicitors for Appellant—*Wolff and Wolff*, Agents for *Mellows & Son*, Peterborough.

Solicitors for Respondents—*Bridges, Sawtell & Co.*, for *Percival & Son*, Peterborough.

NOTE.—In view of the antiquarian interest in this case, a *résumé* is here added of the part of Sir John Simon's argument omitted in the above report.

After tracing the history of the eight hundreds of the Abbot of

Burgh in Northamptonshire from the time of Edgar, counsel referred especially to the two hundreds of Nassaburgh and of the vill of Burgh and contended that the latter hundred had been created the City of Peterborough and was not situate within the area of jurisdiction of the hundred or Liberty of Nassaburgh, and that the alleged act of perjury had been committed within the City of Peterborough, and that therefore the Justices sitting in a court of Oyer and Terminer or of Gaol Delivery for the hundred or Liberty of Nassaburgh had no jurisdiction to try that offence. In support of his argument he referred to—

(1) *Placita de quo Warranto*, 3 Edw. 3, confirmed by a charter of *Inspeximus*, 2 Eliz. Confirmation Roll, Part I. m. 7.

(2) Charter 8 Hen. 7, Pat. Roll Part II. m. 15 (s. 7).

(3) Charter creating the episcopal see and City of Peterborough, 33 Hen. 8, Pat. Roll Part III. m. 11.

(4) Grant of the hundred of Nassaburgh to the Bishop of Peterborough, 33 Hen. 8, Pat. Roll Part III. m. 11.

(5) Grant of the lordship of the Vill of Peterborough to the Dean and Chapter of Peterborough, 33 Hen. 8, Pat. Roll Part III. mm. 14—17.

(6) Survey of the Possessions of the Bishop of Peterborough, Rentals and Surveys, Public Record Office, Roll 842, 33 Hen. 8.

(7) Survey of the Possessions of the Dean and Chapter of Peterborough, 33 Hen. 8, Public Record Office, Rentals and Surveys, Roll 843.

(8) Surrender of the hundred of Nassaburgh by the Bishop of Peterborough to Queen Elizabeth, Close Roll, 19 Eliz. Part XXI. m. 1.

(9) Grant of the hundred of Nassaburgh by Elizabeth to William Cecil, Lord Burleigh, Close Roll, Chancery, Part XXI. m. 13.

BEFORE

THE LORD CHIEF JUSTICE, MR. JUSTICE BRAY, AND MR. JUSTICE ACTON.

JOHN ALFRED FIELD AND WILLIAM THOMAS GRAY.

1921
17 & 18
January.

Reference by Secretary of State under sect. 19 (1) (a) of the Criminal Appeal Act, 1907.

Applicants were convicted of murder, at Lewes Assizes, on 17th December, 1920, before Mr. Justice Avory, and were sentenced to death. They applied for leave to appeal against conviction and to call further evidence.

J. D. Cassels (under s. 10 of Criminal Appeal Act, 1907), for *Field*, applied for leave to call further evidence, and

Sir E. Marshall-Hall, K.C. (with him *John Flowers*), for *Gray* (under s. 10 of Criminal Appeal Act, 1907), made a similar application.

[THE LORD CHIEF JUSTICE: Does the Crown object?]

Sir C. F. Gill, K.C. (with him *Cecil Whiteley*), for the Crown. We throw no obstacle in the way of additional evidence being called.

Field, examined by *J. D. Cassels*, gave evidence implicating Gray, and was cross-examined by *Marshall-Hall, K.C.*, and by *Gill, K.C.*

Gray, examined by *Marshall-Hall, K.C.*, gave evidence implicating Field, and was cross-examined by *Cassels* and by *Gill, K.C.*

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Cassels called four prison warders who denied the truth of certain statements made by *Gray* in the witness-box, and *Gill, K.C.*, also called a witness who denied the statements made by *Gray*.

Cassels addressed the Court on behalf of Field.

Marshall-Hall, K.C., addressed the Court on behalf of Gray.

The LORD CHIEF JUSTICE: The applicants were convicted at Lewes Assizes, on the 17th December, 1920, before Mr. Justice Avory, of the wilful murder of Irene Munro, and were sentenced to death. Against that conviction they have appealed. In addition to their appeal the Home Secretary has, by virtue of the powers conferred by s. 19 (1) (a) of the Criminal Appeal Act, referred the whole case to this Court, desiring that the statements made by both appellants in petitions to the Crown shall be sifted in open Court. The importance of that reference is that it is made to us after a statement made by each appellant to the Home Secretary subsequent to conviction.

That Irene Munro was murdered is beyond dispute. We do not propose to examine in detail the evidence about the identification of the prisoners. That there was ample evidence is beyond question. The direction on law and summing-up of the learned judge at the trial were beyond the possibility of complaint or grievance. Field and Gray have made statements on oath in this Court. We have come to the conclusion, after hearing all the evidence submitted to us, that the statement of neither appellant can be accepted. The appeals of both Field and Gray must be dismissed, and the answer to the Home Secretary's reference is that we think the convictions ought to stand. We pronounce no view affecting the exercise of the Royal Prerogative.

Applications dismissed.

E. A.

BEFORE

MR. JUSTICE AVORY, MR. JUSTICE SALTER, AND MR. JUSTICE GREER.

HENRY WILLIAM BRANDON.

1921
24 *January.*

Severity of sentence.

Appellant was convicted at Birmingham Assizes, on 1st December, 1920, for bigamy, and sentenced by Rowlatt J. to three years' penal servitude.

He applied for leave to appeal against sentence, but was not present.

AVORY J.: This sentence is severe, but it must be remembered that appellant had been convicted in January, 1918, at the Central Criminal Court, for bigamy, and sentenced to twelve months' imprisonment with hard labour. He was released in April, 1918, to enable him to join the Army, and this concession ought to have operated upon the mind of the appellant. Instead of producing any effect, he committed a second offence of the same character in 1920. The judges, in view of the frequency of this offence, have given notice that sentences would be increased. We see no reason to interfere with the discretion of the learned judge.

Application dismissed.

E. A.

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24 *January.*

Avory J.
Salter J.
Greer J.

FRANK TATAM.

Boys under the age of fourteen years cannot be accomplices in sodomy. Cratchley, 9 *Cr. A. R.* 232, 1913, *followed.*

Appellant was convicted at Winchester Assizes, on 2nd December, 1920, for sodomy and for gross indecency, and sentenced by Lord Coleridge J. to eight years' penal servitude and fourteen days' imprisonment with hard labour to run concurrently.

He appealed against conviction and sentences.

W. A. Donald, for appellant (under s. 10 of the Criminal Appeal Act), who was present, urged that three of the boys with whom appellant had committed sodomy were under fourteen years of age and that they were accomplices. The learned judge failed to caution the jury that corroboration was necessary before accepting the evidence of boys of tender years. He submitted that the conviction should be quashed.

Walter Lloyd, for the Crown, submitted that there was no need of corroboration. Boys under fourteen years of age could not be convicted of felony and therefore could not be regarded as accomplices in law. Yet there was corroboration of gifts of money to some of the boys, which appellant admitted. All these facts were before the jury. It is true that the learned judge omitted to caution the jury. See *Cratchley,* 9 Cr. A. R. pp. 232—235: 1913.

Salter J.: In this case the jury were not warned by the learned judge to be careful in accepting the evidence of children, one of whom was over fourteen years of age and three under that age. With regard to the three younger boys, with whom the appellant committed sodomy, we are of opinion that they cannot be accomplices, being unable at law to commit that offence. Further, there was corroboration in respect of the gifts of money. In the case of the eldest boy, who was over fourteen, there was some evidence—not much—that he was an accomplice, and there should have been a warning by the learned judge at the trial. We are satisfied that there has been no miscarriage of justice, and we do not think it right to quash the conviction in this case. [1 Hale

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P. C. 669; East P. C. cap. I.] In regard to the sentence of fourteen days' imprisonment with hard labour passed on four counts of the indictment for gross indecency, that will be quashed, on the ground that the acts of gross indecency are the same as the acts of sodomy for which sentence of penal servitude has been passed. With regard to the sentence for sodomy, we are satisfied that it is not too severe having regard to a previous sentence of five years' penal servitude for a like offence, and to the fact that there are statements from sixteen other boys similar in character to those made by the four boys concerned in the present case.

Appeal dismissed: one sentence quashed.

E. A.

BEFORE

MR. JUSTICE BRAY, MR. JUSTICE AVORY, MR. JUSTICE SHEARMAN, MR. JUSTICE SALTER, AND MR. JUSTICE GREER.

1921
31 *January.*

THOMAS ALLSOPP WHEAT AND MARIA STOCKS.

A bonâ fide *belief on the part of the defendant that he has been divorced from a woman living is not a defence to a charge of bigamy if in fact he has not been divorced.*

Tolson, 23 *Q. B. D.* 168: 1889, *discussed and distinguished.*

The appellants were convicted on November 11th, 1920, at Derby Assizes, Wheat of bigamy, and Stocks of aiding and abetting bigamy, and were each sentenced by Sankey J. to one day's imprisonment. They appealed against conviction on certificate. The jury in answer to a question left to them by Sankey J. found that both appellants in good faith, and on reasonable grounds, believed that Wheat was liberated by divorce from the bond of his lawful marriage. Upon that finding Sankey J. directed a verdict of guilty to be recorded.

Norman Birkett for appellants (under s. 10 of the Criminal Appeal Act), who were not present. Wheat honestly believed that he was divorced, and the jury so found. It was a complete answer to the charge of bigamy if the accused in good faith, and on reasonable grounds, believed that he was liberated from the matrimonial tie. Mr. Justice Sankey had directed the jury to return a verdict of Guilty.

Wheat was married in 1911, and had two children by his wife. On the outbreak of war he joined the army and served until 1918. During his absence his wife went away with another man, by whom she had two children. In 1918 Wheat discovered what

was going on, and came home. He was discharged in 1919. In December he went to live at the house of the father of the appellant Stocks. He was perfectly straightforward with the girl, and he told her of the conduct of his wife. Stocks took charge of his two children, and, as Wheat was illiterate, she conducted his correspondence with a solicitor, who was instructed to take proceedings to divorce Mrs. Wheat. Wheat, on finding that Stocks was about to become a mother, sent an urgent telegram to the solicitor, and a letter was received from him which was construed by both appellants to mean that the divorce had been accomplished. The letter was dated July 1st, 1920, and it read:—"We have received your telegram, and hope to send you papers for signature in the course of the next day or two." That was the letter on which the jury found that Wheat had a reasonable belief that he had obtained a divorce from his wife. On receipt of the letter he went to a friend and, clapping his hands, said: "Thank God my divorce has gone through." The friend said in evidence that Wheat's heart was full of joy. Within three weeks he married Stocks. Counsel cited *Tolson,* 23 Q. B. D. 168; 58 L. J. M. C. 97; 16 Cox C. C. 629, 1889: C. C. R., which shewed that the statute of 1861 was not a prohibitory statute, and that *mens rea* was necessary to create the offence.

[SHEARMAN J.: *Mens rea* means an intention to do an act prohibited by the statute; it has not necessarily a moral connotation.]

Counsel cited *Lolley,* 2 Cl. & F. 568; R. & R. 237, 1812, where conviction was confirmed, but that case was before *Tolson.* Bigamy became a crime by 1 Jac. 1, c. 11 (repealed 9 G. 4, c. 31, s. 1), which made it punishable by death.

[SHEARMAN J. referred to *Russell,* 1901, A. C. 446; 70 L. J. K. B. 998; 20 Cox C. C. 51; 85 L. T. 253: H. L.]

Birkett argued that the present case related to mistake of fact, and not to mistake of law. He cited *Thompson,* 70 J. P. 6, 1905; *Connatty,* 83 J. P. 292, 1919; *Sherras* v. *De Rutzen,* 1 Q. B. 918 and 921, 1895; *Chisholm* v. *Doulton,* 22 Q. B. 736, 1889; and *Prince,* L. R. 2 C. C. R. 154, 1875. He said that there was a case in which a whole family had believed that a marriage

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Bray J.
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was invalid because the wedding ring was of brass and not of gold. That was clearly a mistake of law, and was unreasonable. Here the mistake was one of fact, and the jury had found that it was reasonable.

The *Attorney-General* (with him *H. D. Roome* and *E. L. Hadfield*) for the Crown. The argument for appellant was based on the confusion of two things which ought to be kept distinct. The finding of the jury was quite immaterial, and if it were held to be material he would contend that there was no evidence to support it. S. 57 of the Act of 1861, repeating the statute of James, declared it to be a felony to marry any other person during the lifetime of a former husband or wife, subject to four exceptions, one being the presumption of death after the lapse of seven years, and another actual divorce. In the former case the excuse of absence was only valid if there were no knowledge on the part of the accused that the spouse was alive, but in the case of divorce there was no presumption, because it was an artificial thing the truth of which was ascertainable with mathematical precision. In this country it had taken a statute to make bigamy an offence, and a statute should be strictly construed. He quoted Mr. Justice Manisty in *Tolson's* case, 23 Q. B. D. at p. 201.

[SHEARMAN J.: *Mens rea* is an intention to do an act forbidden by statute. You say, Mr. Attorney, that *Tolson* is limited to presumption of death?]

Yes.

[AVORY J.: And that *Tolson* should not be extended?]

Yes. In the case of divorce a man must not talk about reasonable ground: he must prove the divorce. The cases of *Thompson* and *Connatty* both related to presumption of death, and not of divorce. In *Russell*, as in *Lolley*, where the subject was divorce, the question of presumption was not referred to. It would be wrong to give to *Tolson* the extension sought. What was asked by counsel for appellants was not only that there should be one law for the wise and another for the foolish, but that there should also be a number of laws in between.

[AVORY J.: There would have to be different laws for different people, according to their intelligence.]

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THOMAS ALLSOPP WHEAT AND MARIA STOCKS.

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That is really the contention of my friend. The whole question has arisen—not for the first time—because of the profound confusion of analogy which led people to suppose that what related to the presumption of death in bigamy cases was relevant also in divorce. I ask the Court to say that the doctrine laid down in *Tolson* has no application to that part of the proviso in the Act of 1861, which solely relates to divorce.

Birkett in reply. *Tolson* went very much farther than the restricted and narrow view for which the Attorney-General contended. My submission is that the decision in *Tolson's* case applied to every part of the Act of 1861.

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AVORY J. (*a*): The appellant Thomas Wheat was convicted of bigamy and the appellant Marian Stocks of aiding and abetting in the commission of the offence. The alleged bigamous marriage between the appellants took place on the 21st July, 1920. The jury, in answer to a question put to them by the learned judge at the suggestion of counsel for the defence, found that the appellants in good faith and on reasonable grounds believed that the man Wheat had been divorced at the time he went through the form of marriage with Stocks on the said 21st of July. The only evidence submitted to the jury upon which the finding could be based was that the appellant Wheat's wife had committed adultery; that in 1919 he was admitted as a poor person to bring divorce proceedings against his wife; that in May, 1919, solicitors were assigned to him to conduct those proceedings; that after some delay he provided the solicitors with a sum of money to meet the out-of-pocket expenses; that on the 23rd of April, 1920, the solicitors wrote: "We can now proceed with the matter and will lose no time over your petition"; and that in reply to a telegram

(*a*) This judgment is printed from a shorthand transcript supplied by the courtesy of the Director of Public Prosecutions.

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sent by the appellant Wheat, the terms of which were not in evidence, the solicitors wrote him on the 1st July, 1920, "We have your telegram and hope to send you papers for signature in the course of a day or two," and the appellant Wheat gave evidence on oath that he was a man of little education, and that on the receipt of that letter he believed that he was divorced. The appellant Stocks did not give evidence. In these circumstances we are of opinion that there was no evidence upon which the jury could find that the appellants or either of them believed in good faith on reasonable grounds that the appellant Wheat had been divorced, and assuming that such a finding would afford any defence, the appeal would have to be dismissed on that ground alone. The learned Judge, however, notwithstanding that finding, directed a verdict of Guilty in order that the question of law, whether such a finding does afford any defence to a charge of bigamy, might be determined in this Court.

Counsel for the appellants has contended that the decision in *R.* v. *Tolson*, 23 Q. B. D. 168, in which it was held that a *bonâ fide* belief on reasonable grounds in the death of the husband at the time of the second marriage afforded a good defence to the indictment, governed this case, and that it followed from that decision that a *bonâ fide* belief on reasonable grounds that the accused had been divorced afforded a good defence.

Upon reference to the statute 24 & 25 Vict. c. 100, s. 57, we find the offence defined in these words: "Whosoever being married shall marry any other person during the life of the former husband or wife shall be guilty of felony." To this absolute prohibition there are in the proviso three exceptions applicable to British subjects—(1) When the husband or wife has been "continually absent . . . for the space of seven years then last past" and has not been known by the accused "to be living within that time"; (2) When the accused "at the time of such second marriage" has been "divorced from the bond of the first marriage"; (3) When the "former marriage" of the accused has been "declared void by the sentence of any Court of competent jurisdiction." It has been decided in the case of the first exception that upon proof of the continuous absence for seven years the accused is entitled to an acquittal in the absence of proof by the prosecution that the accused knew that the wife or husband, as the case may be, was living within that time, and as the

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Attorney-General has pointed out in his argument for the Crown, this exception creates or involves a presumption of death which, unless rebutted by the prosecution, entitles the accused to an acquittal—in other words, the accused is presumed to believe in such circumstances that the former wife or husband is dead at the time of the second marriage and therefore has no intention of doing the act forbidden by the statute, viz., of marrying during the life of the former husband or wife. In the case of the second exception there is no indication in the statute that any presumption or belief is to afford any defence, the words do not admit of any such qualification, and the only defence under this head appears to be that the accused has in fact been divorced from the bond of the first marriage. If he has not, then at the time of the second marriage he is a person who, being married, intends to do the act forbidden by the statute, viz., to "marry during the life of the former wife." Having regard to this distinction between the two exceptions, we are of opinion that a *bonâ fide* belief on reasonable grounds that the accused had been divorced, when in fact he has not been divorced, affords no defence in law to the charge of bigamy, although it may afford good reason for the infliction of a nominal punishment, and in our opinion this decision is not in conflict with the decision of the majority of the judges in *R.* v. *Tolson,* but is in accord with the principle of the judgment in *R.* v. *Prince,* L. R. 2 C. C. R. 154: 1875.

In the case of *Tolson* the accused believed on reasonable grounds that her husband was dead, therefore she did not intend at the time of the second marriage to do the act forbidden by the statute, viz., to marry during his life, and it was said in that case that the exception in the proviso shewed that mere separation for seven years has the effect which reasonable belief of death caused by other evidence would have at any other time. See particularly the judgment of Stephen J. at p. 192. It is true that the judgment in *R.* v. *Tolson,* though influenced to a great extent by that proviso, proceeded mainly on the application of the maxim "*Actus non facit reum, nisi mens sit rea*"—a maxim admitted to be uncertain and often misleading in its application, but it was limited in that case to the belief in the death of the former husband, and the case now in question of a belief in a divorce having been obtained was not discussed or considered. In our opinion the maxim in its application to this statute is satisfied if the evidence establishes

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an intention on the part of the accused to do the act forbidden by the statute, viz., being married, to marry another person during the life of the former wife or husband. See the judgment of Bramwell B. in *R.* v. *Prince,* at p. 175, on the application of this maxim, and *Bank of New South Wales* v. *Piper,* 1897, A. C. at p. 390. Counsel placed great reliance on the statement in the judgment of Mr. Justice Cave on page 181 of *R.* v. *Tolson.* "At common law an honest and reasonable belief in the existence of circumstances which, if true, would make the act for which a prisoner is indicted an innocent act has always been held to be a good defence. This doctrine is embodied in the somewhat uncouth maxim '*Actus non facit reum, nisi mens sit rea.*' Honest and reasonable mistake stands in fact on the same footing as absence of the reasoning faculty, as in infancy, or perversion of that faculty, as in lunacy. Instances of the existence of this common law doctrine will readily occur to the mind. So far as I am aware it has never been suggested that these exceptions do not equally apply in the case of statutory offences unless they are excluded expressly or by necessary implication." If the learned judge was laying this down as a principle applicable to all statutes, we do not agree with him. The principle is stated too widely. In any event it was not necessary for the decision of that case. In the case of *R.* v. *Lolley,* 2 Cl. & F. 567: 1812, also in R. & R. 237, where the accused relied upon a divorce in Scotland by way of defence to a charge of bigamy under 1 Jac. 1, c. 11, which contains a similar proviso, and which was argued before all the judges by Mr. Brougham for the prisoner, it was not even suggested that a *bonâ fide* belief on reasonable grounds of the validity of the divorce would afford any defence. In the case of *R.* v. *Russell,* 1901, A. C. 446, where the defendant had obtained a divorce in one of the States of America, and it was not disputed that he honestly believed the divorce was valid and that he was free to marry again, it was recognised that this was no defence in law, the divorce in fact being invalid according to English law, and the defendant was permitted to plead the circumstances in mitigation of punishment. One other case remains to be noticed which was relied on by counsel, viz. *R.* v. *Thompson,* 70 J. P. 6, 1905, in which the late Common Serjeant directed the jury that "If at the time of the second marriage the accused *bonâ fide* believed that his first marriage was invalid on the ground that the woman he then

married had a husband alive at the time, he would be entitled to an acquittal." The prisoner was convicted and the question was not further discussed. It is not necessary in the present case to express an opinion on the ruling of the learned Common Serjeant, which was probably based on *R.* v. *Tolson*, but we doubt if it can be supported—consistently with our present decision.

On both grounds therefore the appeal fails and must be dismissed.

Appeals dismissed.

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BEFORE

MR. JUSTICE AVORY, MR. JUSTICE LUSH, AND MR. JUSTICE SANKEY.

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WILLIAM COTTON.

The Court will use its disciplinary powers in the case of frivolous appeals against sentence.

Application for leave to appeal against conviction and sentence.

The appellant was convicted on December 21st, 1920, at the Central Criminal Court, of conspiracy, forgery and uttering, and was sentenced by the Common Serjeant to twelve months' imprisonment in the second division. The applicant was not present.

AVORY J.: There is no error in law submitted by the appellant, and in passing sentence the learned judge took into account his previous excellent character and marked that by allowing the sentence—not, in the circumstances, a severe one—to be served in the second division. This is a frivolous application—90 per cent. of the applications to this Court are frivolous—and in this case considerable waste of public money has been caused by reason of the preparation of 264 pages of a report of the trial from shorthand notes and the copies required by this tribunal. Public time, moreover, has been utterly thrown away, because this Court sits only to determine whether justice has been done and not for the re-trial of criminal cases. We have grave doubt whether in this case we ought not to exercise the power conferred upon us and increase the sentence already passed. As it is, we mark our sense of the impropriety of this application by refusing it and ordering that the sentence shall commence from to-day.

Application refused.

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STANLEY WALTER ELLEY.

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In receiving evidence after conviction, of a defendant's antecedents, the Court is bound to exercise care in discriminating between the knowledge of the deponents and their hearsay information.

Appeal against sentence and application to call further evidence.

The appellant, who was present, was convicted on 5th October, 1920, at Bournemouth Sessions, of larceny, and was sentenced to three years' penal servitude.

Evidence was given by Harry Croxall, butler to a former employer of appellant, that Elley was not dismissed for stealing; and a letter from the secretary of Lord Ashfield to the Court stated that no charge was made against Elley of dishonesty whilst in Lord Ashfield's service.

Appellant read a statement alleging perjury on the part of two police officers at the trial. He denied that he was the associate of thieves or that he had been dismissed from two situations for dishonesty and violence.

Avory J.: We have made inquiry and we are satisfied that the information given by the two police officers at the trial was inaccurate. The appellant denied it at the trial. It is manifest that the learned Recorder was grievously misled by the police reports, otherwise he would not have used the phrase, "I think you are a dangerous rascal." There are seven previous convictions for dishonesty against the appellant, but for the past seven years Elley has led an honest life. We must again repeat that it is the bounden duty of all police officers to exercise the most scrupulous care in presenting to any Court the record of an accused person. Police reports are not based strictly in law upon evidence which can be tested fully by judges or counsel, and it is clear that in this case the appellant's punishment was increased by reason of the report of the police witnesses. As he was two months awaiting trial, the sentence will be reduced to fifteen months' imprisonment with hard labour, to commence from the date of conviction.

Sentence reduced.

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ALEC WALTER BUTLER.

Severity of sentence.

Appeal against sentence.

Appellant was convicted on the 8th of January, 1921, at Middlesex Sessions, and sentenced by the Chairman to three years' penal servitude for garage-breaking. Appellant was present.

Lush J.: The appellant pleaded guilty to breaking into a garage, and was sentenced to three years' penal servitude. The Court accepts his written statement about the two revolvers found in his possession. His record is a bad one. At the age of twelve he was sent to an industrial school. He has never had a fair chance in life—for the record of his family is bad—and the benefits of a good home have been denied him. At the present time he is only twenty-one years of age. On that ground, and also taking into account his unhappy family history, we have decided to reduce the sentence to one of twelve months' imprisonment with hard labour, to date from conviction.

Sentence reduced.

E. A.

ERNEST LYONS.

Before admitting the testimony of an unsworn child, the judge is bound to satisfy himself that "the child is possessed of sufficient intelligence to justify the reception of the evidence and understands the duty of speaking the truth" within sect. 30 of the Children Act, as amended by 4 & 5 Geo. 5, c. 58, s. 28 (2), and to warn the jury that the child's evidence must be corroborated by some other material evidence in support thereof implicating the accused.

Appeal against conviction.

Appellant was convicted on the 1st December, 1920, at Swansea Assizes, before Mr. Justice Bray, and sentenced to three years' penal servitude and twelve months' hard labour (concurrent) for

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carnal knowledge and attempted carnal knowledge of two girls under thirteen years of age. Appellant was not present.

W. N. Stable, for the appellant (under s. 10 of the Criminal Appeal Act), submitted that as both children had given evidence not upon oath under s. 30 of 8 Edw. 7, c. 67, as amended by s. 28 (2) of 4 & 5 Geo. 5, c. 58, and the learned judge had omitted to direct the jury on the law of corroboration, the conviction was bad in law and ought to be quashed. Even if such direction had been given, there was no corroboration here, as the section requires. Appellant had throughout denied both offences, and no steps were taken by the learned judge to satisfy himself that either of the children possessed sufficient intelligence to justify the reception of her evidence and understood the duty of speaking the truth. Neither of the children had mentioned the name of appellant until after they had been threatened with a beating. Counsel relied on the case of *W. Davies,* 11 Cr. A. R. 272, 1915.

Roland Oliver for the Crown. It is true that no suggestion was made to the jury that unsworn evidence of children of tender years should be corroborated, but there had been significant admissions by appellant of giving pennies to the children when they were in the engine-room in which he worked.

[AVORY J.: Surely the pennies might have been given to induce the children to go away. Such gifts could be given quite innocently.]

AVORY J.: The appellant was convicted of carnal knowledge of a child of eight years of age and with attempted carnal knowledge of a younger child, nearly eight years old. Both children were called and gave evidence. No preliminary questions were put to either child by the learned judge in order to satisfy him that they possessed sufficient intelligence to justify the reception of their evidence, and that they understood the duty of speaking the truth. (Children Act, 1908.) Nor were the subsequent conditions, of warning the jury against the danger of accepting unsworn testimony without corroboration, complied with. (Criminal Justice Administration Act, 1914.) Some children do not pass the preliminary test of intelligent apprehension of facts,

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and we have no evidence before us that either of these witnesses had the slightest idea of the effect of their testimony, or of what they were talking about. There was oversight on the part of the learned judge, and also failure of the counsel for the defence to call attention to that oversight when it could easily have been remedied. Following the decision in *W. Davies,* 11 Cr. A. R. 272, we find that these omissions are fatal to the conviction being allowed to stand. There has been a miscarriage of justice, and the conviction upon both indictments must be quashed.

Conviction quashed.

E. A.

BEFORE

MR. JUSTICE AVORY, MR. JUSTICE SANKEY, AND MR. JUSTICE GREER.

ALLEN WALTER CLARKE.

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14 *February.*

Frivolous application.

Appeal against sentence.

The appellant was convicted at the County of London Sessions, on January 11th, 1921, of obtaining various sums of money by false pretences, and was sentenced by the Chairman to eighteen months' imprisonment. Mr. Justice Bray had refused leave to appeal against sentence.

The appellant was not present and no counsel appeared.

AVORY J.: This is a fraud of a reprehensible character. The appellant after being acquitted at the Central Criminal Court, on December 31st, 1920, and knowing that another prisoner had been convicted, called on the latter's wife, falsely represented to her that he was a solicitor or the son of a solicitor practising in the country, and that he would undertake an appeal on behalf of her husband if she would pay 10*l.* to him. She paid him this sum, and he subsequently obtained from this woman other sums amounting to 100*l.* in all in connection with the same pretence. His story was quite untrue; he was not a solicitor or the son of a solicitor, and no appeal was ever brought. Sentence will date from to-day, so that the only result of this frivolous application is that the applicant has added one month to his term of imprisonment.

Application dismissed.

F. P. F.

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PATRICK McCLUSKEY.

The convicting Court which orders a payment towards the costs of the prosecution as part of the sentence, has no power to inflict imprisonment in default of such payment.

Appeal against sentence, by leave of the Court.

Appellant was convicted at Liverpool City Sessions, on January 6th, 1921, of obtaining money by false pretences, and was sentenced to twelve months' imprisonment in the second division and ordered to pay 10*l.* towards the costs of prosecution or in default two months' further imprisonment.

Appellant was not present and no counsel appeared.

Avory J.: In this case the Court granted leave to appeal against that part of the sentence by which the prisoner was ordered to undergo two months' imprisonment if he failed to pay 10*l.* towards the costs of the prosecution. In the opinion of the Court this portion of the sentence could not be justified. The Director of Public Prosecutions has now considered the matter, and he does not propose to justify the imposition of this alternative punishment. The Court has no power to order imprisonment in default of payment of these costs, and that part of the sentence will be quashed, the order being simply that the prisoner pay 10*l.* towards the costs of the prosecution.

Sentence of imprisonment in default of payment quashed.

F. P. F.

BEFORE

MR. JUSTICE AVORY, MR. JUSTICE GREER, AND MR. JUSTICE SWIFT.

CHARLES HENDRICK.

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On trials for unlawful gaming within s. 4 of 17 & 18 *Vict. c.* 38 (*the Gaming Houses Act*, 1854), *the question whether a given game is lawful or not is for the Court, and while the jury should be directed to consider the character of the place in question, and the issue, "Is it a game of mere skill?" they should always, whatever specific questions are put to them, be asked to return a verdict of guilty or not guilty.*

A finding that "skill predominates" would not, per se, *be an acquittal.*

Davies, 1897, 2 *Q. B.* 199, *followed.*

Appeal on certificate against conviction on a point of law.

Appellant was convicted on the 5th day of January, 1921, at the Surrey Sessions, of an offence against sect. 4 of the Gaming Houses Act, 1854 (17 & 18 Vict. c. 38), and bound over.

Sir E. Carson, K.C. (with him *Cecil Hayes*), for the appellant. Appellant had organised a progressive whist drive and dance at the Drill Hall, Camberley, wherefor the charge of admission was 2*s.* each, for both men and women. The players moved from table to table, changing partners, and those returning the highest scores received prizes—5*l.* first prize, and 3*l.* second prize. The police evidence was that everything was fair and orderly. No evidence was given at the trial to what the game of whist was, but it was admitted that a whist drive was held and that appellant had organised it.

The Deputy-Chairman considered that he was bound by the decision in *Morris* v. *Godfrey*, 106 L. T. 890; 28 T. L. R. 401; 76 J. P. 297: Div. Ct. 1912, which he thought was on

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all-fours with this case, and decided that progressive whist was an unlawful game because chance predominated, and said that he should direct the jury to find a verdict of guilty. He said the question whether progressive whist was a game of skill or chance was for the Court, and that it had been decided that it was. The Chairman asked the jury to find (1) whether appellant organised the whist drive, (2) whether it was conducted by a continuous change of tables and partners, and, at the request of the appellant's counsel, he asked the jury whether skill predominated. The jury answered questions (1) and (2) in the affirmative, but on the third they said that skill predominated. The Chairman said that it had already been decided that in a game played in this way chance predominated, and told the jury to find the appellant guilty, which they did, and he was convicted and sentenced.

It is submitted, first, that a judge has no right to direct a verdict, but only to point out what is in law an unlawful game. It is for the jury to say guilty or not guilty. The finding of a special verdict was deprecated by Lord Russell, C. J., in *Davies,* 1897, 2 Q. B. 199; 66 L. J. Q. B. 513; 76 L. T. 786; 41 S. J. 511: C. C. R. Can, then, a judge say to a jury "If you find certain facts it is your duty to convict"? Fox's Libel Act, 1792 (32 Geo. 3, c. 60), declared that the jury may give a general verdict.

No, it was declaratory of the common law, taking away an exception to the general law which had been judicially introduced into prosecutions for libel; the words of sect. 2 are "in like manner as in other criminal cases."

Allday, 8 C. & P. 136: 1837. The jury have a right to take the whole matter into consideration and say whether the accused had a guilty mind, and whether, there, in altering the document there was fraudulent intent, and the verdict was not guilty.

In *Dudley,* 14 Q. B. D. 273: 1884, the facts of the special verdict were found by jury at the suggestion of the judge.

Secondly, it is submitted that skill predominates in this game.

The question whether skill or chance predominates is a question of fact, and in this case no evidence was given. An unreported case was cited from Coldridge and Hawksford's Law of Gambling (1913), p. 282. In *Burnett, The Times,* February 10th, 1913, the defendant had organised "partners' whist drives," and two partners played together during the evening, and "the Recorder directed the jury that if the introduction of partners

converted the game into one wherein skill predominated over chance they should" acquit.

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[AVORY J.: Here, though partners might have been selected at the start, they were afterwards brought together at haphazard.]

In the absence of evidence, how could the judge find appellant guilty?

[GREER J.: The jury might contain Quakers and others who thought touching cards sinful and be ignorant of whist or other games of cards.]

Automatic machine cases were cited. *Donaghy,* an Irish case, reported 77 J. P. 244: Div. Ct. 1913, where the case was sent back to the magistrates to find, *inter alia,* "Was the game in its predominant character one of chance or skill?" and "If the game is not predominantly one of skill, did skill enter into it substantially?"

Counsel also cited *Fielding* v. *Turner,* 1903, 1 K. B. 867; and *Pessers, &c.* v. *Catt,* 29 T. L. R. 381: C. A. 1913.

The Chairman withdrew from the jury the question whether the game was one of chance. The general issue should have been left to the jury.

R. E. Otter, for the Crown, referred to *Davies* (above), and submitted that the effect of the Deputy-Chairman's direction was the same as if he had said: "You ought to find a verdict of guilty." On the second point, the jury could use their own knowledge of whist. There was ample evidence how progressive whist was played. In any event, the finding that skill predominated was immaterial. The whole question of skill or chance must be treated as an inference of law to be drawn by the Chairman from the facts. (See *Morris* v. *Godfrey.*) The third question was only left to the jury in order that their answer might be recorded. The Chairman's view was clearly stated in his summing-up.

[AVORY J.: *Morris* v. *Godfrey* was a case on facts found by the magistrate, and it was referred to the Court to find the law.

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GREER J.: The jury can always say "not guilty," and this Court cannot send it back to find "guilty." Where is the evidence that skill did not predominate?]

They moved from table to table with new partners.

[SWIFT J.: Has it not to be found whether it is a game of skill or chance, and, if so, which predominates?]

It was argued as a case to be sent to this Court.

[AVORY J. referred to *Jenks* v. *Turpin*, 13 Q. B. D. 505; 53 L. J. M. C. 161; 49 J. P. 203; 15 Cox, C. C. 486: Div. Ct. 1884.]

That case was not cited as it did not appear that the place could be regarded as a common gaming-house.

Carson, in reply. This is not a common gaming-house, but the charge is for keeping a place for unlawful gaming.

[GREER J.: A game of three quarters skill and one quarter chance—what is it? It is impossible to eliminate chance.]

The judge had withdrawn the case from the jury. Is it the finding of a jury when the judge directs them to find the accused guilty? It is a highly important question whether, when a man has a right to be tried by a jury, they have not the right to acquit.

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W. N. M. G.

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AVORY J. read the following judgment: The appellant was indicted for keeping a gaming-house contrary to s. 4 of the Gaming House Act, 1854 (17 & 18 Vict. c. 38), the particulars of the offence being that having the use of a certain room he on divers days kept or used it for the purpose of unlawful gaming being carried on therein. The indictment was presented and the case came on to be tried before a jury at the Quarter Sessions, the

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appellant having claimed his right to be tried by a jury under s. 17 of the Summary Jurisdiction Act (42 & 43 Vict. c. 49).

At an early stage of the proceedings and before any evidence had been called the Deputy-Chairman intimated that if the facts proved were similar to those in the case of *Morris* v. *Godfrey*, 106 L. T. 890, he would tell the jury as a matter of law they must find a verdict of guilty.

Evidence was then given that the appellant had hired the hall or room in question for a number of evenings for whist drives, or playing the game of progressive whist, that the public were invited by advertisement to these whist drives, and admitted on payment at the door of the sum of 2*s*. each, that the game was played with cards for money prizes, which were presumably provided out of the monies received from the players and distributed by the appellant, and a description was given of the manner in which the players were arranged at the tables and how at the conclusion of each game they moved to other tables so as not to play again with the same partner. Beyond this no evidence was given of the way in which the game of whist or this particular form of it is played or of the elements of chance and skill in it.

In his summing-up the Deputy-Chairman told the jury that it had been decided that an ordinary whist drive was illegal, and that there is more chance in a whist drive than skill, that there was no dispute about the facts, and he asked them to answer three questions:

(1) Did the defendant on the dates named organise a whist drive by hiring a hall, charging for admission, advertising it, and distributing money prizes?

(2) Was the whist drive conducted by a continuous system of changing the tables and partners?

(3) Did skill or chance predominate?

telling them at the same time that the third question was only put at the request of the counsel for the defence, and that their answer to it would make no difference in the result.

The jury answered the first two questions in the affirmative, and in answer to the third they said "skill predominated."

Upon those answers the Deputy-Chairman directed a verdict of guilty, which was recorded, and gave leave to appeal.

Sir Edward Carson, for the appellant, contended that in these circumstances the Deputy-Chairman had usurped the functions

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of the jury, that the verdict recorded was not the verdict of the jury, and that it ought to be set aside and the conviction quashed, citing *R.* v. *Davies*, 1897, 2 Q. B. 199, and *R.* v. *Allday*, 8 C. & P. 136, in support of this contention.

We are of opinion that there was ample evidence in this case upon which the jury, if they had been properly directed as to the law, might have found that the appellant had been guilty of keeping a gaming-house and using the hall or room for the purpose of unlawful gaming being carried on therein—a gaming-house being defined as "a house in which a large number of persons are invited habitually to congregate for the purpose of gaming": *vide per* Hawkins J. in *Jenks* v. *Turpin*, 13 Q. B. D. at p. 516.

Playing at games of cards for money is gaming, not necessarily unlawful, but unlawful if played in a common gaming-house as part of the business thereof: *vide* S. C. at p. 513; *vide* also *R.* v. *Ashton*, 1 E. & B. 286.

It is not suggested that the game of whist or progressive whist is within the category of games which are declared by statute to be unlawful wherever played, but Mr. Justice Hawkins, in the same case, at p. 524, says: "all games of chance and skill combined (which cannot be called games of mere skill) are in my opinion clearly within the meaning of the words 'unlawful games' in 17 & 18 Vict. c. 38, *i.e.*, unlawful if played in a house kept for playing at them." This description clearly applies to the game of progressive whist as played on the occasions in question.

The attention of the jury in the present case was not called to the essential question as to character of the place in which the game was played, nor was there any direction in law as to what constituted unlawful gaming, or a gaming-house; but they were directed to find a verdict of guilty on the ground that the case was, in the opinion of the Deputy-Chairman, in all respects similar to the case of *Morris* v. *Godfrey*.

It is true that in that case the Divisional Court upheld the decision of the magistrate upon his finding of the facts and held that in the game of progressive whist chance predominated over skill, which, having regard to the argument, was equivalent to a finding that it was not a game of mere skill; but we do not think this justified the Deputy-Chairman in the course which

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he took of dictating the verdict instead of leaving the jury to find their own verdict on the facts in accordance with a proper direction as to the law applicable to the case.

With regard to the answer of the jury to the third question that skill predominated, we think there was no evidence upon which they could so find, and that such a finding would not of itself entitle the appellant to an acquittal, as we have already indicated, the only relevant question being whether it was a game of mere skill.

The answers of the jury to the questions put to them are not in themselves sufficient to enable the Court to give judgment treating them as a special verdict. We must therefore give effect to the appellant's contention, and allow the appeal and quash the conviction.

Conviction quashed.

Solicitor for the Appellant—*G. R. Cran.*

BEFORE

MR JUSTICE DARLING, MR. JUSTICE AVORY, AND MR. JUSTICE GREER.

1920
28 *February.*

THOMAS CHARLES DAWSON.

Severity of sentence.

Appeal against sentence.

The appellant pleaded guilty, on February 8th, 1921, at the Lincolnshire Assizes, to a charge of uttering a letter demanding money with menaces, and was sentenced by McCardie J. to five years' penal servitude.

No counsel appeared.

The appellant handed to the Court a written statement, which was read aloud. In this statement he asked for the mercy of the Court as he and his wife, and three grandchildren living with them, were starving when he committed the offence. The appellant stated that he did not realise the gravity of his offence at the time, and asked for some other form of punishment to be inflicted so that his wife and grandchildren should not be left alone and forced to go into the workhouse.

DARLING J.: The appellant wrote a letter demanding 10*l*. from a widow who kept a public-house. Before the receipt of this letter she had been fined for selling drink during prohibited hours, and the letter stated (in effect) that since that conviction her house had been under constant observation; that the appellant was able to stop further proceedings which, if taken, would result in the loss of the licence; but that all evidence would be destroyed if the sum of 10*l*. was sent to a given address before a certain date. The recipient of the letter took it to the police, who kept watch at the address given in the letter and found that the appellant was the writer of the letter. The appellant had been previously

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convicted three times of small offences. At the trial Police-Superintendent Holmes said that the appellant had served seven years in the Army and three in the Reserve. He then took up gardening and obtained a post under the Board of Agriculture in New Zealand. In 1915 he rejoined the Army, and after serving for three years was discharged with the rank of sergeant and with a conduct sheet marked "very good." This present offence is the first serious offence committed by the appellant. His disability pension has been reduced under the regulations of the authorities, and he has persons dependent upon him. The writing of the letter in question was undoubtedly most unjustifiable, and the judge at the trial took a serious view of the case. But blackmail, though a very grave offence, has its degrees, and having regard to the appellant's career and to all the circumstances, we have come to the conclusion that the sentence of five years' penal servitude was excessive. The proper sentence will be eighteen months' hard labour, to run from the date of conviction.

Sentence reduced.

R. F. B.

BEFORE

MR. JUSTICE DARLING, MR. JUSTICE COLERIDGE, AND MR. JUSTICE SHEARMAN.

CHARLES TELLETT.

1921
7 *March.*

The Court declines to receive evidence of insanity when it has not been offered in defence at the trial.

S. Lumb, 7 *Cr. App. R.* 263, 1912, *followed.*

Application for leave to appeal against conviction, and for leave to call further evidence.

Appellant was convicted of murder, at the Central Criminal Court, on February 8th, 1921, and was sentenced to death by Rigby Swift J.

Ernest Charles, K.C. (with him *W. W. Grantham*), for the appellant, who was present. This is a peculiar case, and it is desirable that the Court should hear evidence which was not forthcoming at the trial. There counsel appeared for him, and the defence raised was that the crime was that of manslaughter only. Appellant was a Canadian, and had served with the Canadian forces in the war from 1915 to 1917. He had been wounded in the head and had suffered from concussion. Upon his discharge from the Army it was stated on his medical certificate that he had "neurasthenia and pains in the head due to shrapnel wounds." At the date of the trial there was no evidence as to insanity, and this defence was not raised; but afterwards reports were received from persons at Woolwich who had worked with appellant, and also cablegrams from the Minister of Justice and the Prime Minister for the Dominion of Canada as to appellant's mental condition. These cablegrams were founded on reports sent by officers in the Canadian forces, under whom appellant had served in France; they shewed that after his injuries he was "not quite responsible for his actions," and that he was "abnormally irritable." This evidence was embodied in an affidavit by appellant's solicitor.

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CHARLES TELLETT.

Darling J.
Coleridge J.
Shearman J.

[SHEARMAN J.: Would not this jurisdiction be better exercised by the Home Secretary?]

There are cases to that effect, but as defendant appealed it was thought best to bring the circumstances before this Court.

[DARLING J. referred to *Lumb*, 7 Cr. App. R. 263, 1912.]

Cecil Whiteley, K.C. (with him *Percival Clarke* and *R. E. Otter*), for the Crown. There was no evidence at the trial on which the jury could have found that appellant was insane at the time he fired the revolver. Witnesses will not be heard in this Court on insanity when the defence was not raised in the Court below. The question is one for the Home Secretary.

DARLING J.: In this case appellant was convicted of murder, at the Central Criminal Court, on February 8th, and sentenced to death. There was nothing in the evidence given at the trial to suggest insanity. He had been drinking, but he was not drunk, and the evidence shewed that he had been threatening the woman whom he afterwards killed by shooting her with a revolver. He was defended by counsel, who submitted that it was a case of manslaughter. Since the trial evidence has been forthcoming from persons at Woolwich Arsenal, who presumably knew him before the crime was committed. The public authorities in Canada have also transmitted evidence from soldiers who knew appellant in France, which goes to shew that he was insane two years before. In both cases the evidence would have been material if it had been forthcoming at the trial. Now it is not the practice of this Court to order a re-trial and to allow fresh evidence to be heard except in very special circumstances. In no case, so far as I am aware, has this been done where the defence is insanity, and that plea was not raised at the trial. Therefore this is a new case as regards this form of application. The reasons for which this Court declines so to deal with these cases have often been stated. Here much of the evidence comes from persons in Canada, and if we were to re-hear the case witnesses would have to be brought over for examination in the usual way. The same applies to the evidence from Woolwich. If we were to re-hear the case, we should be bound by the rules of evidence; but if the case is left to the Home

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Secretary, whose powers are expressly reserved by the Criminal Appeal Act, he can act more freely and with greater regard to appellant's interest than would otherwise be the case. If he is satisfied that appellant is insane he can order him to be detained in a lunatic asylum. Nothing is here shewn which leads us to take an exceptional course, and we shall leave the case to be dealt with by the Home Secretary, who will consider pleas for mercy which we cannot consider. The evidence deals with appellant's state of mind, and it is important evidence although given in a way which would not be admissible before us. No Minister of the Crown would desire to act except with the greatest consideration towards those in our Dominion beyond the seas who ask for the reconsideration of the case of one who fought for us in the war. In the best interest of appellant himself we do not propose to interfere, but to leave it to the Home Secretary, who will give to the case every consideration.

Application dismissed.

Solicitors for the Appellant—*Charles Russell & Co.*

F. P. F.

ARTHUR PHILLIPS.

Observations on concurrent sentences.

Appeal against conviction and sentence.

Appellant was convicted on February 8th, 1921, before the Deputy-Chairman, at the County of London Sessions, of larceny from the person on November 30th, 1920, and was sentenced to five years' penal servitude. This sentence was ordered to run concurrently with a sentence of twelve months' imprisonment which was passed on appellant at a Metropolitan Police Court in June, 1920, for a similar offence, and which he was then serving.

J. A. Keeves, for the appellant (under s. 10 of the Criminal Appeal Act), who was present.

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ARTHUR PHILLIPS.

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J. W. Moyses for the Crown.

DARLING J.: There has been a good deal of uncertainty in criminal Courts about the exact effect of passing sentence on a prisoner who is already serving a sentence, and about the effect of passing sentence of penal servitude on a prisoner who is already serving a sentence of imprisonment. The Home Office has lately reconsidered the rules on the subject, and, as a result, the following communication has been addressed to the Master of the Crown Office:—

"When two concurrent sentences of penal servitude, or penal servitude and imprisonment with hard labour, are passed at the same time, the longer sentence will be carried out and the other will be of no effect. Of course, if the longer sentence should be quashed on appeal, or remitted, the other will take effect. When during the currency of one sentence (as in that case) another sentence is passed and is to run concurrently with the first—which is always the case unless the Court expressly orders the sentences to be consecutive—this new sentence, or the remainder of the old sentence, whichever is the longer, that which involves the longer detention in prison will be carried out and the shorter sentence will have no effect. The only exception to this will be the rare case when the new case is for an offence—for example, an assault on a warder—after the previous sentence was passed. This will be decided specially by the Home Secretary."

This extract from the letter of the Home Office will explain to those who are concerned with the administration of justice the effect of passing sentence in such cases.

Appeal dismissed.

F. P. F.

Solicitors for the Appellant—*Margetts & Co.*

BEFORE

MR. JUSTICE DARLING, MR. JUSTICE AVORY AND MR. JUSTICE SANKEY.

FRED QUARMBY.

1921
21 *March.*

"Uncontrollable impulse" is not a defence in law.

The applicant was convicted at Manchester Assizes on the 25th February, 1921, of murder, and sentenced by Mr. Justice Acton to death.

W. Madden (with him *E. Rowson*) appeared for the applicant, and *F. B. Merriman, K.C.* (with him *J. H. Thorpe*), for the Crown.

Madden (for applicant) said that the defence raised at the trial was that the crime was committed in a moment of impulsive insanity, the result of irresistible impulse. The grounds of appeal were misdirection and that the verdict was against the weight of evidence, and that Acton J. misdirected the jury in not putting before them the evidence of the medical witnesses. He cited *R.* v. *Victor Jones*, 4 C. C. R. 207, 1910. Counsel argued that the sub-conscious mind of a person afflicted with delusions was a factor which should be considered in connection with acts committed by one whose unrestrained passions resulted in crime.

DARLING J.: The King's Bench determines the existing law, not what the law might be if amended by the legislature.

SANKEY J.: Foreign and colonial codes admit the defence of "irresistible impulse." The English law does not.

AVORY J.: The jury decided that there was no evidence upon which they could have reasonably found applicant to be insane.

Counsel for the Crown was not called upon.

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21 *March.*

FRED QUARMBY.

Darling J.

DARLING J.: The applicant was convicted of the murder of a woman with whom he had been living in adultery. It was committed in circumstances which showed deliberation and premeditation, and was followed by expressions of satisfaction that he had killed the woman and of regret that he had not killed her mother at the same time. All these facts were proved and were not disputed. The defence raised and argued before the jury was that the prisoner was insane within the definition of English law at the time of the act. If the jury had been of that opinion their duty would have been to return the special verdict. The contention, upon medical evidence, that the prisoner was insane was based upon grounds never yet admitted in any English court of justice. The law of England had long laid down that evidence of premeditation, deliberation and the gratification of revenge ought to be taken into account in determining whether cases of homicide were murder or manslaughter. But murder did not amount to a criminal act if done by an insane person. In such cases the law provided the special verdict of "Guilty, but insane."

We are satisfied that the learned judge properly and carefully directed the jury. He gave the correct definition of the kind of insanity, according to law, which would have justified a special verdict, and pointed out that if the question of uncontrollable impulse had to be considered there was no evidence that the prisoner was under an uncontrollable impulse, because every fact went to shew premeditation. The appeal is dismissed.

Application dismissed.

Solicitor for Applicant—*Roland Robinson,* Blackpool.

E. A.

BEFORE

MR. JUSTICE DARLING, MR. JUSTICE AVORY AND MR. JUSTICE SALTER.

NEIL KERR.

1921
22 *March.*

When violence has been used by conspirators, each one must be distinctly affected with the knowledge of the design to hurt.
In a proper case each judge of the Court will give his opinion.

The appellant, who was present, was convicted at Liverpool Assizes, on February 14th, 1921, of conspiring to murder, and was sentenced by Commissioner Sir A. A. Tobin to ten years' penal servitude. He was also convicted of conspiracy to commit arson, and sentenced to two years' imprisonment with hard labour, the two sentences to run concurrently. He appealed against conviction on law and applied for leave to appeal against sentence.

E. G. Hemmerde, K.C. (with him *W. Madden*), appeared for appellant; the *Attorney-General* (with him *W. Ashton, K.C.*, and *J. E. Singleton*) for the Crown.

Hemmerde said that on the conviction for conspiracy to murder there was no case to go to the jury. He did not propose to argue the appeal on the conviction for conspiracy to commit arson. On the night of November 27th fires broke out simultaneously in Liverpool. Behind those outbreaks there was some common purpose. Implements for warehouse-breaking had been purchased, and some of them had been so used. The appellant was one of a group charged with conspiracy to commit murder, and it was not contended that Kerr took any part in arson on the 27th Nov. He was proved to have been elsewhere. A police raid on Kerr's house revealed a receipt for bolt-cutters in Kerr's pocket. It was not proved that Kerr had purchased any bolt-cutters, and

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NEIL KERR.

Darling J.
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this receipt was the one piece of evidence against Kerr on which the jury were asked to convict him for conspiracy to murder. Several documents—a signalling manual, engineering instructions, a page of a book on gun-making, a letter from New York conveying greetings from De Valera, "President, Irish Republic," a pamphlet "Sinn Fein Leaders, 1916," certificates of "Irish Republic" bonds—were found in Kerr's possession. There was no evidence that De Valera was in favour of murder, and greetings from him to Kerr could not reasonably connect the appellant with any criminal act.

There was another incident. A man named Fowler was charged with the murder of a man called Ward. When he was acquitted on that charge and arraigned on a charge of conspiring to commit murder, a juryman protested, and the prosecution, without admitting that the plea of *autrefois acquit* could be maintained, withdrew the charge. Fowler was then tried and convicted of conspiring to commit arson and sentenced to two years' imprisonment.

The Attorney-General: The question is whether there was any evidence on which the jury could find Kerr guilty of conspiring to commit murder. My friend has admitted that the appellant was rightly convicted of conspiring to commit arson. On the night in question there were twenty-three fires in warehouses and timber yards in Liverpool and Bootle. They broke out simultaneously, the result of preparation and organised action. Bolt-cutters were used; goods were saturated with oil and ignited. In three cases there were *mêlées* with the police, and wherever the police came into contact with the actors in these arsons revolvers were fired in every case at the police. A man found in Kerr's house was convicted of attempted murder of police constables, and the jury were entitled to draw the inference—which they had drawn—that Kerr was a party to the conspiracy to commit murder. I submit that the matter was clearly put to the jury by the learned Commissioner. The possession of the receipt for bolt-cutters and the shooting at the police with revolvers on each occasion that the cutters were used were sufficient to enable the jury to arrive at the conclusion that on Nov. 27th, wherever the police came into collision with persons committing arson and there was shooting at the police, it was part of a conspiracy to murder.

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DARLING J.: The appellant was indicted with other persons, some of whom were convicted of conspiracy to commit murder—the murder of certain named police officers and of other persons assisting the police. He was also convicted of a conspiracy to set fire to property in Liverpool, and his counsel does not contest that the appellant was properly convicted on the charge of conspiring to commit arson. The evidence shewed quite clearly that it was part of a conspiracy to damage this country in order, as was declared, that Ireland might in some way or other come by its own. In the course of committing arson a person was murdered, and we have to decide the one question whether there was evidence to go to the jury that the appellant was not only guilty of conspiracy to commit arson, but also guilty of a conspiracy to murder the police. The evidence, admittedly, was not abundant on this graver charge. Certain documents and books shewed that the appellant was intimately acquainted with persons unlawfully assuming the designations of President and members of the "Irish Republic." His two sons were members of an illegal association called "Sinn Fein," and he himself was a member, and there were strong reasons to suspect that he consented to all the incidents that might accompany the carrying out of the conspiracy to which he was undoubtedly a party.

Was there evidence that the learned Commissioner ought to have left to the jury so as to find Kerr guilty of conspiracy to murder? I have come to the conclusion—although not without considerable hesitation—that there was not, and that the learned Commissioner ought to have withdrawn it from the jury. The case for Kerr has been greatly strengthened having regard to the proceedings in Fowler's case. Fowler had been tried for an attempt to murder a certain police officer who was fired at by a man in Fowler's company at the time of the discharge of the revolver and was in conspiracy with him. A juror suggested that Fowler should not be tried for conspiracy to commit murder as he had been acquitted on the charge of attempted murder; therefore counsel for the Crown withdrew the case, which, if right, should logically lead to the withdrawal of the case against Kerr. I cannot help thinking that the prosecution would not have withdrawn the case against Fowler if it had not been for the unfortunate interposition of the juror; but Kerr had a more remote connexion with these outrages than Fowler, and this makes

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it difficult to say why Fowler should be acquitted and Kerr convicted of the charge of conspiracy to commit murder.

One member of this Court does not agree with my opinion. That being so the members will at my request express their separate opinions, as the difference is purely on a point of law. My own view is that the case should not have been left to the jury.

AVORY J.: I agree that there was no evidence on which the jury could properly find that the appellant was guilty of a conspiracy to commit murder. It is of the greatest importance that, in one of the most difficult charges for an accused person to meet, the rules of evidence should be strictly observed. When there is no evidence that an accused person had taken part, or by an overt act had taken part, in a conspiracy to commit murder, it must at least be proved that he knew that murderous weapons were going to be used, and that his co-conspirators would, if obstructed by the police, resort to the use of firearms with intent to murder or cause grievous bodily harm to the police. The question here is: Did the appellant know that such violence was going to be used? There is no evidence of it. If there was a conspiracy to commit arson, and one party, without the knowledge of the other, decided to resort to murder, they were not all guilty of conspiracy to murder.

SALTER J.: If the only evidence against the prisoner were his own acts, I should agree there was no case against him on the indictment in question. But it is admitted that he was party to a conspiracy to destroy property by fire. It is also admitted, as there was abundant evidence to prove, that the persons who came into conflict with the police were parties to this conspiracy and were engaged in carrying it out. The nature and scope of the conspiracy must be inferred from the acts of the conspirators committed in pursuance of it. On every occasion on which the conspirators came into contact with the police they were found to be armed with firearms, and they used these weapons with the utmost promptitude and determination to resist arrest. The fact that on every occasion the conspirators used firearms to resist arrest is, in my opinion, some evidence that the use of firearms to resist arrest was part of the plan. If the use of firearms to resist arrest

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NEIL KERR.

Darling J.

was part of the plan, the conspiracy was a conspiracy to murder. I think the case was rightly left to the jury.

DARLING J.: In accordance with the views of the majority of the Court, the conviction of conspiracy to commit murder is quashed. The conviction of conspiracy to commit arson will stand, and, as there was now no appeal against sentence, that of two years' imprisonment with hard labour is confirmed. No order will be made about the date of the commencement of the sentence.

Solicitors for the Appellant—*Messrs. Vizard, Oldham & Co.*, Agents for *Mr. G. J. Lynskey*, Liverpool.

One conviction quashed.

E. A.

BEFORE

MR. JUSTICE DARLING, MR. JUSTICE AVORY, AND MR. JUSTICE SANKEY.

1921
11 *April.*

JOHN MOLLOY.

In s. 8 (1) *of* 6 *&* 7 *Geo.* 5, *c.* 50, *the Larceny Act*, 1916, *the words "steals or with intent to steal rips, cuts, severs or breaks . . . any . . . fixture" include two distinct felonies, and a count which charges both alternatively is bad.*

On an indictment under this section there cannot be a conviction of simple common law larceny.

Appeal against conviction and sentence by leave of the Court.

Appellant, who was present, was convicted on the 1st March, 1921, at the Stoke-on-Trent Quarter Sessions, of larceny of fixtures under s. 8 (1) of the Larceny Act, 1916, and sentenced by the Recorder to three years' penal servitude (after many previous convictions). The first count alleged that he "on the 8th of January, 1921, stole or with intent to steal ripped cut severed or broke one grate . . . then being fixed to the dwelling-house and premises," &c. A second count alleged a previous conviction.

David Davies, for the appellant (under s. 10 of the Criminal Appeal Act), who was present, submitted, first, that before the Indictment Rules were made, a count in this form charging alternative offences would unquestionably have been bad: *Cotterill* v. *Lempriere*, 24 Q. B. D. 634: 1890: c. q.; *Slater*, 67 J. P. 199: 1903: c. q.; *Wells*, 20 T. L. R. 549: 1904: c. q.; *Jones*, 37 T. L. R. 299: 1921. The form in Archbold 553 (edn. 1918) has no statutory force, and was not justified by Indictment Rule 5. Secondly, there was no evidence that appellant was the person who severed the fixtures, and on this indictment there could not be a conviction of simple larceny: *Gooch*, 8 C. & P. 293: 1838;

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Millar, 7 C. & P. 665: 1837; *Molloy*, 111 L. T. N. S. 166; 10 Cr. App. R. 75: 1914: c. q.

Appellant is 73 years old and was not represented below.

J. H. Thorpe, for the Crown, admitted that the form of indictment in Archbold was not an authorised form made under Rules prescribed by the Indictments Act, 1915. The 1916 statute contemplated two distinct felonies, viz., stealing and doing certain acts with intent, &c. The acts were laid in the alternative as showing different methods of committing the same felony. A count charging both felonies in the alternative could not be supported.

AVORY J.: In this case it is clear on the authorities quoted that when two felonies are charged in the same count of an indictment, such indictment—unless it can be cured by the Indictments Act, 1915—is bad on the ground of duplicity. An indictment will also be bad on the ground of uncertainty if, like this, it charges two alternative offences in one count. The form given on p. 553 of Archbold (1918 edn.) no doubt misled the draftsman of the indictment in this case. But that form is not one authorised by Indictment Rule 5 (1915), which does not refer to alternative *offences*, but only to the doing of a single act in alternative ways. It is also clear from *Gooch*, 1838, and the other cases cited that on this indictment appellant could not be convicted of simple common law larceny, and there was no evidence here on which the jury could find that he was the severer of the fixtures. For these reasons the conviction must be quashed.

Conviction quashed.

E. A.

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11 *April*

SAMUEL SMITH.

Darling J.
Avory J.
Sankey J.

A judge is not bound, in passing sentence, to take into account outstanding charges against the defendant, though the latter may ask him to do so.
Syres, 1 *Cr. App. R.* 172, 1908, *followed.*

Appeal against sentence by leave of the Court.

Appellant, who was present, pleaded guilty on 7th March, 1921, at Leeds Assizes, to two indictments under the Debtors Act for obtaining credit by fraud, and was sentenced by Mr. Commissioner H. Young, K.C., in each case to twelve months' imprisonment with hard labour, the sentences to be consecutive. Before receiving sentence appellant asked the learned Commissioner, in passing sentence, to take into consideration 43 other similar cases to which he desired to plead guilty. The Commissioner replied: "Twelve months' imprisonment is the utmost punishment I can give under the statute [Debtors Act]. I do not take into consideration the 43 remaining cases alleged to be cases of obtaining goods under false pretences."

J. H. Thorpe, for the Crown, was not called upon.

DARLING J.: Appellant pleaded guilty at Leeds Assizes to obtaining goods to the value of £76 on credit by fraud. He had previously been sentenced, for similar offences, to twelve months' imprisonment with hard labour, and Mr. Commissioner Young passed sentence of twelve months' imprisonment with hard labour —the maximum punishment allowed under the Debtors Act. A judge is not bound, in passing sentence, to take into account other charges pending against a prisoner. In *Syres*, 73 J. P. 13; 25 T. L. R. 71; 1 Cr. App. R. 172: 1908, it was decided that a judge *may*, in passing sentence, take into account other charges which a prisoner admits. It would be a serious innovation to extend this principle and to make it compulsory upon the judge so to do in the manner desired by appellant. We see no reason why the Court should lay down any such rule. Mr. Justice Channell's dictum (in *Syres*) clearly limited the exercise of this discretion to offences of the same class. Now, in the case of this appeal there are stated to be 43 outstanding charges. Some of

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11 *April.*

SAMUEL SMITH.

Darling J.

these may not be offences under the Debtors Act, but graver charges, such as obtaining goods by false pretences, for which appellant might properly have been indicted at Leeds Assizes. He was not so indicted; and in this case we think that it would be highly improper to prosecute appellant for any of the outstanding offences which are of the same nature as those for which he has been convicted here. He is a man who has already served three sentences of penal servitude, and this fact no doubt operated upon the mind of the learned Commissioner in making the sentences consecutive. We confirm those sentences.

Appeal dismissed.

E. A.

THOMAS EVANS AND EDWIN IRETON.

12 *April.*

Severity of sentence.
The Court (semble) *leans against a sentence of flogging on first offenders.*

Appeal against conviction and sentence by leave of the Court.

Appellants, who were present, were convicted on the 9th of March, 1921, at Cardiff Assizes, of robbery with violence, and each sentenced by Mr. Justice Swift to six months' imprisonment and eighteen strokes with the cat.

Bertram Long, for Evans, and *Austin Jones,* for Ireton (under s. 10 of the Criminal Appeal Act), submitted that there was no evidence of violence or of conspiracy, and that the learned judge in summing up did not sufficiently deal with the question of common object or concerted design between those who committed the assault and appellants.

DARLING J.: Appellants were indicted, with two other persons, for robbery with violence upon a Chinese named Ching Ping. One of the assailants who was acquitted appeared to have been drunk. There was quite sufficient evidence for the jury to convict both appellants. Ireton knocked down Ching Ping and Evans bent over him and robbed him. Although there was some fault in summing up by the learned judge, we are satisfied that there has

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12 *April.*

THOMAS EVANS AND EDWIN IRETON.

Darling J.

been no miscarriage of justice, and that the omissions in the summing-up do not amount to misdirection. The verdict in each case was right and must stand. In regard to sentences, Evans has not a good character and we do not think his sentence too severe, and it is confirmed. Ireton stands in a different category. He is a first offender, 20 years of age, and had a good character as a labourer in the service of the Cardiff corporation. It is clear that he assaulted Ching Ping, but no stolen property was found in his possession, and we have come to the conclusion that he should not be flogged. We have therefore altered his sentence to one of nine months' imprisonment.

One sentence of flogging quashed.

E. A.

BEFORE

THE LORD CHIEF JUSTICE, MR. JUSTICE DARLING, AND MR. JUSTICE AVORY.

JAMES ARTHUR NEWTON PICKERING.

1921
18 *April.*

In the case of frivolous appeals against sentence the Court will exercise its power of increasing sentence.

This was an application for leave to appeal against conviction and sentence.

Appellant was convicted of fraudulent conversion, at the Central Criminal Court, on 23rd February, 1921, and sentenced by the Recorder to eighteen months' imprisonment with hard labour.

I. G. Kelly, for appellant, who was not present, urged that there was no evidence of entrusting to bring the case within s. 20 (4) (a) of the Larceny Act, 1916, as the prosecutrix apparently treated the transaction as a purchase: *Laurens,* in 1915, 11 Cr. App. R. 215. If there was evidence of entrusting, the learned Recorder had not properly put it to the jury, in view of the distinction drawn in that case. There had been a miscarriage of justice by reason of the joinder in one indictment of counts for fraudulent conversion and obtaining credit by fraud: *G. W. Norman,* 1915, 1 K. B. 341; 84 L. J. K. B. 440; 79 J. P. 221; 11 Cr. App. R. 58. In any event the sentence was excessive in view of the previous good character of appellant.

DARLING J.: In this case we are unable to find a single redeeming feature, and we think the point raised is a bad one. Appellant was convicted of an exceptionally bad and cruel crime. He had induced a woman to live with him immorally and, having gained her confidence, induced his paramour to part with her money. There were fourteen counts in the indictment and appellant was convicted on the last seven counts, no

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18 *April.*

JAMES ARTHUR NEWTON PICKERING.

Reading L.C.J.
Darling J.
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verdict having been taken on the earlier counts. Miss Carter's evidence was supported by that of the bank manager, and it was clear that appellant never purchased flats in Jermyn Street or elsewhere, and that the prosecutrix parted with £500 honestly believing appellant's story that she was acquiring by that payment an interest in the property. The sentence was justified by the evidence. The application is entirely frivolous. With regard to *Norman*, we wish to say that the observations at the end of the judgment there refer to the particular circumstances of the case, and should not be taken as a precedent of general application.

The LORD CHIEF JUSTICE: It must be thoroughly understood by applicants to this Court—as repeated warnings have produced little effect—that frivolous and worthless appeals against sentence will assuredly lead to increase of punishment. Public time cannot be wasted with impunity, nor can public money be thrown away in the preparation of reports of trials from shorthand notes, without our marking our sense of the impropriety of such applications. In this case it means that six and a half weeks have been added to the term of appellant's imprisonment, leave to appeal not having been granted.

Application dismissed.

E. A.

Solicitors for Appellant—*Carter and Bell.*

JAMES FORD.

Previous convictions in another country are properly taken into account in sentences here.

Appellant was convicted at the Central Criminal Court, on the 11th March, 1921, for conspiracy and false pretences, and sentenced by L. Coleridge J. to two years' imprisonment with hard labour.

He applied for leave to appeal against sentence, but was not present.

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J. P. Valetta, for appellant, urged that the sentence was too severe. He is 23, and ought to have been dealt with as a first offender on account of his youth. The two previous convictions in Australia were not for serious crimes and ought not to have been allowed to weigh against appellant.

DARLING J.: We have come to the conclusion in this case that Mr. Justice Coleridge properly took into account the two previous convictions recorded against appellant in Australia. His character is bad; and, although he is only 23 years of age, two previous convictions for the "confidence trick" indicate the nature of his criminal tendencies as a swindler. In view of the circumstances—disclosed in evidence—by which appellant obtained £1,000 by a despicable fraud, we cannot regard the sentence as too severe. It would be entirely against the public interest to exclude convictions outside the jurisdiction of this Court from being taken into consideration by a judge in passing sentence. We agree with the dictum of Mr. Justice Hamilton in *Heard's* case, 7 Cr. App. R. 80: 1911, and do not consider that there are any grounds for interfering with the sentence passed upon appellant.

Application dismissed.

E. A.

ADELINE ASHFORD HOWARD.

25 *April.*

A statement by a co-defendant who is an accomplice of another defendant is not corroboration of the evidence of other accomplices against that defendant. On the point of corroboration by an accomplice there must be a proper direction.

Appeal on points of law against a conviction for conspiracy to procure a miscarriage and for using an instrument with that intent.

Appellant was convicted of the above offence, on the 21st March, 1921, at the Leeds Assizes, before Mr. Commissioner Hugo Young, K.C., and was sentenced to eighteen months' imprisonment with hard labour.

At the trial, evidence which implicated the accused was given by two women, Mrs. Mills and Mrs. Beevers, both of whom were

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also charged in relation to the offence, and were admittedly accomplices. One Melville, who was originally charged with the murder of the deceased, made a voluntary statement to the police, and this was put in evidence against the accused. The appeal was based on the following grounds:—(1) That as the only evidence admissible against the accused was that of Mrs. Mills and Mrs. Beevers, both of whom were accomplices and had been fellow-prisoners, there was no evidence against the accused on which she ought to be convicted; (2) that the learned Commissioner misdirected the jury (a) by failing to advise them to acquit the accused on the ground that the only evidence against her was that of untruthful accomplices; (b) by giving only a perfunctory and unsatisfactory warning to the jury of the danger of accepting the evidence of the accomplices; (c) by directing them that an unsworn written statement containing hearsay allegations against the accused made by her fellow-prisoner and accomplice, Robert Melville, might be regarded as corroboration of the evidence of the said accomplices; and (d) by directing them that Mr. Mills was not an accomplice.

Coddington, for the appellant (under s. 10 of the Criminal Appeal Act, 1907), who was not present. The case involves a question of grave importance on the question of admissibility of evidence. The point is whether matter, admittedly not evidence against the accused at the trial, can be treated as corroborative evidence. An unsworn statement was made to the police by a fellow-prisoner and accomplice, and consisted, as against appellant, of hearsay evidence; how can this possibly be said to be corroborative evidence against the accused? The charge made against the accused was one of procuring abortion; but the medical evidence did not establish the fact that any artificial means of procuring abortion had been resorted to at all. According to the doctor's evidence, it might have been a case of natural abortion. The woman on whom the operation was alleged to have been performed was dead. The two women, Mills and Beevers, both of whom gave evidence against the accused, were admittedly accomplices, and were tainted witnesses. Their evidence before the coroner was admittedly false, and one of them at least must have committed perjury. In addition to this, on the case as put forward by the prosecution, they were accomplices. A charge of manslaughter was preferred against them, but no evidence in support of the charge was offered. They were formally acquitted and were sub-

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sequently called as witnesses for the prosecution. Mr. Mills was clearly also an accomplice. Melville, who was originally charged with the murder of the deceased woman, made a voluntary statement to the police implicating the accused. That statement was not on oath, but it was put in by the police-inspector when giving his evidence. It is true that the learned Commissioner told the jury that the statement of Melville was not direct evidence against appellant, but he also told them more than once that the statement could be accepted as corroboration of the story told by the other accomplices.

[DARLING J.: Melville was himself an accomplice. How could he corroborate anyone when his own statement needed corroboration?]

That is my point. (He was stopped.)

J. H. Thorpe for the Crown. The evidence in this case was sufficient to warrant the conviction, and the proper warnings were given to the jury. There are passages in the summing-up with which fault can be found, but on the whole the case was fairly put before the jury. Even if the statement of Melville cannot be treated as corroboration of the evidence given by the other accomplices, their evidence might have contained facts on which the jury could rely without the necessity for corroboration. The learned Commissioner may have used the words "corroboration" and "evidence" in the wrong sense from a legal point of view.

[AVORY J.: How could a jury be asked to rely on the uncorroborated evidence of witnesses who committed perjury at the coroner's inquest?]

The LORD CHIEF JUSTICE: The appellant was convicted of conspiring with a man named Melville and the deceased woman, Taylor, to procure the miscarriage of the latter. The appellant appeals against her conviction, and the Court has had the advantage of a very able argument by counsel on both sides. The point which this Court has to decide is whether the conviction can stand. At the trial of the accused, two accomplices, Mrs. Mills and Mrs. Beevers, and Mr. Mills, gave evidence for the prosecution. The learned Commissioner in his summing-up undoubtedly did

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warn the jury against accepting the evidence of the accomplices, but later on he nullified that warning by directing the jury that the voluntary statement made by Melville, who was a fellow-prisoner, was corroboration of the evidence given by the accomplices. On the evidence given by the accomplices and the statement made by Melville there was a clear case against the appellant, Howard, but Melville's statement could not be treated as corroboration of the evidence given by the accomplices. The learned Commissioner seems to have thought that it could, and that, therefore, the accomplices' evidence, which would otherwise be tainted, could be accepted. The Court cannot accept that view of the matter. The whole question of corroborative evidence was dealt with in the case of *Baskerville*, 1916, 2 K. B. 658; 86 L. J. K. B. 28; 115 L. T. 453; 80 J. P. 446; 60 S. J. 606; 12 Cr. App. R. 81. In the present case there is nothing to corroborate the evidence of the accomplices except the statement of another accomplice, and the case is one in which it was essential that there should be proper and sufficient corroboration. There was an agreement beforehand by the parties concerned that the deceased woman, Taylor, should take the blame for the operation on herself, and at the inquest the two women accomplices told a story which was entirely untrue. The evidence given by them at the trial could not therefore be regarded as trustworthy. It is true to say that the jury can believe the evidence given by an accomplice if they wish to do so, but the Court cannot allow such a belief to prevail where it is found that the jury have not been properly directed on the point. The appeal must be allowed and the conviction quashed.

Conviction quashed.

R. F. B.

FRANK KESNER AND BENJAMIN POOLE.

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Severity of Sentence.

Appeals against sentence.

Appellants were convicted of larceny, at the Central Criminal Court, on April 5th, 1921, and were each sentenced to five years' penal servitude.

Appellants in person.

The Court refused to interfere with the sentence passed upon Poole, but reduced the sentence passed upon Kesner from five years' to three years' penal servitude on the ground that his record of previous convictions was not of such a serious nature as that of Poole.

Sentence reduced.

R. F. B.

WILLIAM MURPHY.

Conviction quashed in view of fresh evidence not available at the trial. A jury must weigh with care the evidence of an alibi.

Appeal against a conviction for warehouse-breaking, before the Deputy-Chairman of the County of London Sessions, on the grounds that the verdict was unreasonable and of misdirection on an *alibi*.

Appellant was convicted (with Poole and Burrell, who did not appeal) on March 24th, 1921, of warehouse-breaking, and was sentenced to nine months' imprisonment with hard labour. He was granted leave to appeal against his conviction.

Frank J. Powell, for appellant, who was present, applied that a man named Poole, who had been convicted and sentenced at the Central Criminal Court on another charge (see last case), be called as a witness on behalf of appellant. Kesner, who had been con-

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victed with Poole on that other charge, was also called. They both gave evidence in detail exonerating appellant. One Wilson was also called for appellant; he had been asked to attend at the trial, but did not come.

Poole and Kesner gave evidence from the dock. They were cross-examined, as was Wilson, by *Temple Martin,* for the Crown.

G. Temple Martin: The defence set up at the trial was an *alibi,* and it was submitted by the prosecution that no mistake had been made in identifying appellant as the man who was driving the trap which was said to have contained the offenders. The suggestion for appellant was that it was Kesner, not Murphy, who was riding on Murphy's cart. The real question is, who was driving the van in question on the night of 11th February last? Appellant has tried to cast a doubt upon the identification by the police, but it must be remembered that when P.-C. Smith stopped the van he had two lighted lamps to assist him, and as he chased the pony and van for some distance he could hardly fail to identify the men who were in the van, and that Smith recognised Murphy later on the same night when he arrested him in the street.

The LORD CHIEF JUSTICE: The only question in this case is whether the verdict of guilty against the appellant Murphy is correct. The evidence at the trial and before this Court was given with some detail, but it was given in circumstances which make it too doubtful for this Court to act on. The jury ought not to have disregarded the *alibi* set up by appellant. After hearing the evidence given in this Court by the witnesses Wilson, Poole and Kesner, and having noticed the remarkable similarity in the appearance of Kesner and Murphy, we have come to the conclusion that there is so much doubt in the case that the appeal must be allowed and the conviction quashed.

Conviction quashed.

R. F. B.

Solicitor for Appellant—*T. D. Dutton.*

IN THE HOUSE OF LORDS.

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CRANE ..... *Appellant.*

and

THE DIRECTOR OF PUBLIC PROSECUTIONS (on behalf of His Majesty the King) ..... *Respondent.*

Coram: Viscount Finlay, and the Lords Dunedin, Atkinson, Sumner, and Parmoor.

Held (*Viscount Finlay dissenting*) *that when the Court of Criminal Appeal annuls proceedings on indictment on the ground that they are void, it has the power to order a trial on the indictment in question; and*
The Court for Crown Cases Reserved had, and therefore the Court of Criminal Appeal has, the power to award a venire de novo.
Order of the Court of Criminal Appeal affirmed.

Appeal from the Court of Criminal Appeal: 15 Cr. App. R. 23: May 17th, 1920.

J. B. Matthews, K.C., and *G. Wightman Powers* for the appellant.

The *Attorney-General* (with him *Travers Humphreys, G. A. H. Branson,* and *F. Hinde*) for the Crown.

Matthews, K.C. The question here is whether the Court of Criminal Appeal has power to award a *venire de novo*. My submission is that the Court of Criminal Appeal, being created by the Criminal Appeal Act, 1907, has the powers conferred upon it by the statute creating it—no less and no more. The power to award a *venire de novo* can only be conferred (a) by the transfer to the Court of Criminal Appeal of the complete jurisdiction formerly vested in the Court for Crown Cases Reserved (*a*), or

(*a*) By s. 20 (4) of the Criminal Appeal Act: "All jurisdiction and

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(b) by some specific enactment conferring that power. There has been no such transfer of the jurisdiction in error formerly exercised by Courts of Error. That jurisdiction was derived from and founded on writs of error, and the abolition of the writ of error has made an end of the jurisdiction in error: *Alleyne* v. *R.*, 24 L. J. Q. B. 282; Dears. C. C. 505; 5 E. & B. 392; 1 Jur. N. S. 869: 1855. A writ of error was never regarded as a writ of course, or even of right, for the *fiat* of the Attorney-General was invariably required.

At one time the King's Bench, in the case of misdemeanours, claimed the power to order the Attorney-General to grant his *fiat* in a proper case: *per* L. Mansfield C.J. in *Wilkes,* 4 Burr. 2527: 1770; but that claim was finally disposed of in 1855: *Ex parte Newton,* 4 E. & B. 869, when it was decided that although, in misdemeanours, the *fiat* was demandable *ex debito justitiæ*, yet the Attorney-General had sole discretionary power in granting or refusing, and the Court would not review his decision. In cases of treason and felony the absolute discretion of the Attorney-General had never been questioned. Down to 1705, 3 Anne, in treason and felony, if the Attorney-General granted his *fiat* (or certificate, as it was then described) the conviction was quashed as a matter of course, upon writ of error. But the judges, by resolution in 1705, terminated that practice, and from that date the Courts invariably examined the facts and considered whether a suggestion of error in law was well founded, and would no longer quash the proceedings as a matter of course. (Cf. 2 P. & M. *Hist. Eng. Law,* 664; Holdsworth, 1 *Hist. Eng. Law,* 84, 91; Stephen, 1 *Hist. Crim. Law,* 308.) The King's Bench, in all criminal cases, had exclusive jurisdiction in error: Stephens, *Dig. Crim. Procedure,* 195; and the Court of Error never acted unless the error was apparent on the face of the record: Stephen, *Hist. Crim. Law,* above, and 1 Chitty, *Crim. Law,* 743 (*b*); and matters which would not be apparent on the record (*e.g.*, the misconduct of a juror disclosed at the trial) might be directed by the judge to be entered upon the record in order that the Court of Error could

authority under the Crown Cases Act, 1848, in relation to questions of law arising in criminal trials which is transferred to the judges of the High Court by s. 47 of the Supreme Court of Judicature Act, 1873, shall be vested in the Court of Criminal Appeal under this Act. . . ."

(*b*) And *ib.* Vol. 4, 415.

take cognisance of defects if it desired to do so. *Vicary* v. *Farthing,* Cro. Eliz. 411: 1597-8, illustrates the procedure, the same in criminal as in civil cases. A *venire de novo* formed part of the judgment in the writ of attaint, which being obsolete, was abolished by 6 Geo. IV. 50, 60; but putting aside the writ of attaint, a *venire de novo* was awardable either by the Court of Error or by the court of trial. The power of the court of trial in this respect is sufficiently illustrated by all the cases in which the Commissioner of Oyer and Terminer and Gaol Delivery discharged the jury. Courts of Quarter Sessions had the same power: *Campbell* v. *R.*, 11 Q. B. 799; 17 L. J. M. C. 89; 2 Cox C. C. 463; 12 Jur. 117; 2 New Sess. C. 297: 1846; as well as the Court of King's Bench in *Banc,* where the record was in the Court. No distinction existed between criminal and civil cases in the grounds for awarding a *venire de novo.* The only question not finally settled, and which to the last remained in doubt, was whether in a case of felony, all the proceedings being regular, a *venire de novo* could issue by reason of an imperfect verdict: *per* Crampton J. in *Conway and Lynch* v. *R.*, 7 Ir. L. R. 165 at 178: 1845; *Charlesworth,* 9 Cox C. C. 44; 1 B. & S. 460; 31 L. J. M. C. 25; 5 L. T. 150; 8 Jur. N. S. 1091: 1851. There are many cases in which a *venire de novo* was awarded in cases of felony. I refer to the one issued in 1844 by this House in *Gray* v. *R.*, 11 Cl. & Fin. 427; 8 Jur. 879. *Venire de novo,* or more properly *venire facias de novo,* is an expression somewhat loosely used; but there has never been a question about the power of a Court of Error to award a *venire de novo* in a proper case.

Although *Baker,* 28 T. L. R. 363; 7 Cr. App. R. 217: 1912; *Ingleson,* 1915, 1 K. B. 512; 84 L. J. K. B. 280; 112 L. T. 313; 11 Cr. App. R. 21; and *Golathan,* 84 L. J. K. B. 758; 112 L. T. 1048; 31 T. L. R. 177; 79 J. P. 270; 11 Cr. App. R. 79: 1915, are commonly cited as instances of *venire de novo,* they are not strictly such. In those cases a plea of "guilty" had been wrongly entered, and the "mistrial" was antecedent to giving appellant in charge of the jury. The "jury process," in which the writ of *venire facias* was the first step in civil actions and in misdemeanours sent by the Court of King's Bench to be tried at assizes, and in felonies and misdemeanours tried in the Court of King's Bench itself, is explained by Abbott C.J. in *Edmonds,* 4 B. & Ald. 471; 23 R. R. 350: 1821. In Courts of

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Oyer and Terminer and Gaol Delivery no *venire facias* issued, but a precept enjoined the sheriff to summon a sufficient number of jurors for the trial of all criminals. The same procedure was followed at quarter sessions: Chitty, 4 *Crim. Law*, 416-7; and was not affected by the Juries Act, 1825, as appears by a comparison of the 2nd edn. of Chitty's *Crim. Law*, 1826, with the 1st edn. of 1816. Panels of jurors for trial of the issues raised by pleas of "not guilty" were prepared and handed by the sheriff to the clerk of assize. The several writs of *venire facias juratores, distringas juratores*, or *habeas corpora juratorum*, and the entry *jurata ponitur in respectu* were abolished by the Common Law Procedure Act, 1852, 15 & 16 Vict. c. 76, s. 104. The Crown Office Rule, 1886, No. 158 was made in order to remove a doubt whether or not the statute applied to process in criminal cases: Short & Mellor, *Crown Office Practice*, 211, 1st edn.; 2nd edn. 112 n.[1]

When proceedings had been quashed by a writ of error the *venire de novo* was available for the Crown as for the defendant. If the error was "insufficiency of the indictment" he could not resist being tried again. In case of a "mistrial," on arraignment a second time he could not plead "*autrefois arraign*": *Vaux's* case, 4 Co. Rep. 44 a: 1591; and *Withipole's* case, Cro. Car. 134, 147: 1629. This was in marked contrast to cases of "new trials," for no new trial would be ordered after an acquittal: *Duncan*, 7 Q. B. D. 198; 50 L. J. M. C. 95; 44 L. T. 521; 45 J. P 456; 14 Cox C. C. 571: 1881. The practice of ordering new trials in criminal cases began early in the 17th century, and was occasioned partly owing to the writ of attaint having become obsolete. It had no relation to the jurisdiction of the Courts of Error. New trials were ordered by the King's Bench when the record was in that Court, so that the only criminal cases in which a new trial could be ordered were either when the case was originally in the King's Bench by indictment found by the grand jury of Middlesex or information by the Attorney-General, or in the case of indictments for misdemeanours removed into that Court by *certiorari* and usually sent down to be tried at the assizes as civil issues. One of the chief reasons for applying to the King's Bench to remove into that Court an indictment for misdemeanour found at assizes or sessions was in order to obtain a new trial in case of need. In such cases new trials were ordered

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on grounds in all respects identical with civil actions. In one case only—*Scaife*, 17 Q. B. 238; 20 L. J. M. C. 229; 2 Den. C. C. 281; 5 Cox C. C. 243: 1851—was a new trial ordered in a case of felony; this has always been recognised to have been *per incuriam: Bertrand* (*A.-G. for N.S.W. v.*), L. R. 1 P. C. 520; 4 Moo. P. C. N. S. 460; 36 L. J. P. C. 51; 16 L. T. 752; 10 Cox C. C. 618: 1867; *Duncan*, above.

The record—which sole document a Court of Error had before it—contained nothing relating to evidence, or summing-up. Accordingly the jurisdiction in error could not take notice of any question of wrongful admission or rejection of evidence, or of misdirection: Stephens, *Hist. Crim. Law*, above. In order to supply this defect it was, before 1848, the practice for the judges themselves to reserve such questions for discussion at informal conferences at Serjeants' Inn. If they thought that there had been misdirection or wrongful admission or rejection of evidence, they recommended the Crown to grant a free pardon: *per* Crompton J., *Charlesworth*, 1 B. & S. 517. This practice was superseded (*c*) by the establishment of the Court for Crown Cases Reserved by 11 & 12 V. 78. The jurisdiction in error, which was entirely separate and distinct from this procedure, was saved by that statute.

In *Mellor*, D. & B. C. C. 468; 7 Cox C. C. 454: 1858, there was a difference of opinion amongst the judges whether that Court had power to award a *venire de novo*. In *Wakefield*, 1918, 1 K. B. 216; 87 L. J. K. B. 319; 118 L. T. 576; 62 S. J. 309; 34 T. L. R. 210; 82 J. P. 136; 13 Cr. App. R. 56, the Court of Criminal Appeal said that in *Mellor* the majority of judges were adverse to the power of that Court to award a *venire de novo*. But in fact the opinion of the majority was the other way. There was no actual decision in *Mellor* on the point, and it is now submitted that the opinions of Pollock C.B. and the judges agreeing with him should be preferred. Technically, there is a difference between a new trial and a *venire de novo*. No objection ever was or could be made to a *venire de novo* in misdemeanour or civil cases, for the defendant was never in peril, *i.e.*, capitally.

Other cases in which the question of awarding a *venire de novo* were discussed were *Faderman*, 1 Den. C. C. 565; 19 L. J. M. C.

(*c*) Not quite. See *McDonald*, 15 Q. B. D. 329, 1885.

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147: 1850; *Yeadon,* L. & C. 81; 31 L. J. M. C. 70; 9 Cox C. C. 91; 5 L. T. 329; 7 Jur. N. S. 1128: 1861; *Bertrand,* above; *Murphy,* L. R. 2 P. C. 535; 38 L. J. P. C. 53: 1869; *Martin,* L. R. 1 C. C. R. 378; 41 L. J. M. C. 113: 1872.

From the last-mentioned case it would seem that the C. C. R. thought that *Murphy,* above, required that the question should be reconsidered. The only case in which the C. C. R. ordered a *venire de novo*—it is submitted, inadvisedly—was in *Yeadon,* above. Since the establishment of the Court of Criminal Appeal the question had arisen in the following cases only:—*Baker, Golathan, Ingleson, Wakefield*—all above—and *Dickman,* 1910, 74 J. P. 449; 26 T. L. R. 640; 5 Cr. App. R. 135. In *Dickman,* L. Alverstone C.J. expressed the opinion that the C. C. R. had power to award a *venire de novo,* founding that opinion upon *Mellor, Edmonds, Yeadon*—all above—and *Fowler,* 4 B. & Ald. 273: 1821. But neither *Edmonds,* 1821, nor *Fowler,* 1821, throw any light upon the question. The last instances of proceedings in error were *Bradlaugh* v. *R.,* 3 Q. B. D. 607; 14 Cox C. C. 68: 1878: C. A.; and *Castro* v. *R.,* 6 A. C. 229; 50 L. J. Q. B. 497; 14 Cox C. C. 546; 45 J. P. 452; 44 L. T. 350: 1881.

The jurisdiction of the C. C. R. was transferred to the High Court of Justice by s. 47 of the Judicature Act, 1873, 36-7 V. 66. Appeals only were to be allowed for error in law apparent upon the record about which no question should have been reserved to the C. C R. under 11-12 V. 78, thus recognising the distinction between the jurisdiction of the C. C. R. and proceedings in error. Writs of error originally issued out of the Court of Chancery on its common law side, and before the Petty Bag Act, 1849, 12-3 V. 109, 39, jurisdiction to quash writs of error improperly issued was exclusively in the Court of Chancery, but by that Act the jurisdiction of the Court of Chancery on its common law side was transferred to the Courts of Common Law: *Alleyne* v. *R.,* above.

The only known instances in which defendants indicted separately were jointly tried are *Brett and Parish* and *White and others,* 3 Cox C. C. 79: 1848, at Essex Assizes, before L. Denman C.J. In both cases this was done by consent and the matter never came under review by a Court of Error, nor was any question of the propriety of this proceeding reserved for the consideration of the judges. It is submitted that this was irregular notwithstanding

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the consent, more especially in *Brett*, where the one defendant was indicted for felony and the other for misdemeanour. In *Wakefield*, above, the Court of Criminal Appeal founded themselves upon *Tremearne*, 5 B. & C. 254; 4 L. J. (O. S.) K. B. 157; 7 D. & R. 684; 29 R. R. 234: 1826; but that was not a case of *venire de novo*, but of a new trial. It is submitted that by the express language of s. 4 (2)(*d*) of the Court of Criminal Appeal Act, 1907, the jurisdiction of the C. C. A. (subject to the special provisions of the Act) was limited to either dismissing the appeal or allowing it, in which latter case they were bound to quash the conviction and direct a verdict and judgment of acquittal to be entered. This is the course which should have been taken in the present case.

[VISCOUNT FINLAY: Suppose evidence has been improperly admitted, there has been a mistrial—in the ordinary sense the case is mistried—and it is so mistried that the verdict ought not to stand?]

Then the conviction must be quashed, because the C. C. R. had, and the Court of Criminal Appeal has, no power to order a new trial, just as the old judges had none.

G. Wightman Powers. I defended appellant at the Leicester Sessions. The indictments were not read in court, but the Clerk of the Peace read a synopsis or summary of the indictments against the two defendants, who were in the dock together. Both the counsel for the prosecution and myself were under the belief that

(*d*) S. 4.—(1) "The Court of Criminal Appeal on any such appeal against conviction shall allow the appeal if they think that the verdict of the jury should be set aside on the ground that it is unreasonable or cannot be supported having regard to the evidence, or that the judgment of the Court before whom the appellant was convicted should be set aside on the ground of a wrong decision of any question of law, or that on any ground there was a miscarriage of justice, and in any other case shall dismiss the appeal: Provided that the Court may, notwithstanding that they are of opinion that the point raised in the appeal might be decided in favour of the appellant, dismiss the appeal if they consider that no substantial miscarriage of justice has actually occurred. (2) Subject to the special provisions of this Act, the Court of Criminal Appeal shall, if they allow an appeal against conviction, quash the conviction, and direct a judgment and verdict of acquittal to be entered."

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the two defendants, Crane and Morton [15 Cr. App. R. 30], were jointly indicted.

It is submitted that the trial at Leicester was irregular, and that the Crown had admitted its irregularity in the course of the hearing of Crane's appeal. Wrong evidence was, it is submitted, admitted against Crane owing to the fact that Morton was tried at the same time.

[VISCOUNT FINLAY: You say that your substantial case is that evidence was admitted against Crane, owing to his joint trial with Morton, which would not have been admitted had he been tried separately?]

That is so. I submitted to the Court of Criminal Appeal that this was an "irregular" trial. I do not wish to adopt the phrase "mistrial." My point is that the defects in the proceedings at Leicester were such that, on the same footing as the wrongful admission of evidence, the Court of Criminal Appeal should have quashed the conviction. It is a question of irregularity, not of jurisdiction. This is involved in the two cases, *Brett* and *White*, 3 Cox C. C. 79: 1848, for an irregularity can be waived by consent, but jurisdiction in criminal matters cannot be conferred by consent. Concerning *venire de novo* in felony, the reported cases shew that it was awarded only in two classes of cases, viz.:—

(1) where there was something defective in the tribunal; or

(2) where there was no verdict or else something defective in the verdict rendering the verdict in effect no verdict at all.

See *per* Erle J., *Murphy*, L. R. 2 P. C. at p. 548: 1869. In the present case the tribunal was not defective, nor was there any defect in the verdict.

Travers Humphreys, for the Crown. The "point of law of exceptional public importance" [s. 1 (6) of the Criminal Appeal Act] which induced the Attorney-General to issue his certificate was this and this only: has the Court of Criminal Appeal, when it is satisfied that there has been no trial of an indictment, power to order that indictment to be tried? My submission to your lordships is that the order in this case was a good order made by the Court of Criminal Appeal by virtue of its powers under s. 1,

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sub-s. 7 of the Criminal Appeal Act, 1907 (*e*). It is the only section under which the Court could have made any order in this case inasmuch as s. 4 is inapplicable, because none of the four grounds mentioned in sub-s. 7 of s. 4 appear in this case. Therefore if the Court had made an order under s. 4 it must have dismissed the appeal.

[LORD DUNEDIN: It is the powers of s. 1, sub-s. 7, which allow the Court to set aside a conviction and have it tried again?]

Yes.

[VISCOUNT FINLAY: What is the power in the Act if s. 4 does not apply?]

Where s. 4 does not apply you turn to s. 1, sub-s. 7, which uses general words.

[VISCOUNT FINLAY: S. 1 (7) does not purport to confer any separate power. It is merely an enactment enabling the Court to determine any question necessary to be determined in doing justice in dealing with any case before it. It is not a sort of general equitable power.]

Yes, it is s. 1 (7) which enabled the Court to determine that, in this case, there never had been any trial. For that reason I ask your lordships to affirm the award of *venire de novo* by the Court of Criminal Appeal.

The Attorney-General. In my submission, this appeal ought to be dismissed. I hesitate to add anything to the argument of my friend, but I may state the two grounds upon which we rely. The order of the Court of Criminal Appeal is in the following terms: "The Court doth finally determine the same and doth order that the conviction and judgment on the indictment whereon the appellant was convicted be set aside and annulled, and that

(*e*) "The Court of Criminal Appeal shall be a superior court of record, and shall, for the purposes of and subject to the provisions of this Act, have full power to determine in accordance with this Act any questions necessary to be determined for the purpose of doing justice in the case before the Court."

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the appellant do appear at the next quarter sessions to be holden," and so on.

Now, that is not in form an order of *venire de novo*. The ancient writ of *venire* was a writ addressed to the sheriff: *venire facias de novo juratores*, and so on; but it is an order, no doubt, in the form and with the effect of a *venire de novo*, subject to immaterial differences, and it is in fact a form which the Court of Criminal Appeal has employed for a long time. I think the first case was *Baker's* case (above), and there was a series of cases in which the point was—not that there had been in the sense illustrated in this case, a mistrial, or a trial which was a nullity—whether there was a real doubt that defendant, who was said to have pleaded guilty, had in fact pleaded guilty. The effect was the same, no doubt, as the issuing of a writ of *venire de novo*. How is that to be supported? It may be supported on two grounds. First, upon the ground that under the Criminal Appeal Act, 1907, s. 20, sub-s. 4, the Court of Criminal Appeal has jurisdiction to make such an order for the reason that there was jurisdiction and authority to make such an order under the Crown Cases Act, 1848; and the sufficient authority for that proposition is the decision in *Mellor's* case, followed as it was in *Yeadon's* case (above).

The second way in which the matter may be put is under s. 1, sub-s. 7 of the Criminal Appeal Act, 1907. There is not, I think, any controversy about the facts in the present case. The appellant had been tried upon what was believed to be a joint indictment, whereas he and his co-defendant were indicted in separate indictments, and the result was the admission of evidence which otherwise would not have been admitted. The trial in fact was a nullity. It was a cypher. Now suppose that the Court of Criminal Appeal had paused at the first part of the order, so that the whole order ran: "The Court doth finally determine the same" —that is, the appeal—"and doth order that the conviction and judgment on the indictment whereon the appellant was convicted be set aside and annulled." Suppose that it had stopped there, or suppose that the grounds had been added in some such words as "upon the ground that there was a mistrial," or "upon the ground that the trial was a nullity"; and suppose that was the whole of the order, what would the effect have been? There would still have been an indictment upon the record, there would have

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been no real trial, a trial which the Court of Criminal Appeal would have found to be a nullity. It would thereupon have been the duty of the prosecution to put this appellant upon his trial—not again, for he never really had been upon his trial—but to put this appellant upon his trial under the indictment which would have remained. In that view of the matter the words which follow the word "annulled" in the order are, in a sense—and I submit it with respect—surplusage, although they are very convenient as pointing out exactly what should be done.

[VISCOUNT FINLAY: But are you not driven back to the question whether s. 20, sub-s. 4, is a "special provision" within s. 4, sub-s. 2, because s. 4, sub-s. 2, goes on to say that they shall direct a judgment and verdict of acquittal to be entered?]

If I were driven to that, I would make that admission; but I submit that s. 4 must be considered as a whole: sub-s. 2 is part of s. 4, but so also is sub-s. 1. Now, what is sub-s. 1 dealing with? It is dealing with cases where the Court of Criminal Appeal "shall allow the appeal if they think that the verdict of the jury should be set aside [a] on the ground that it is unreasonable, or [b] cannot be supported having regard to the evidence, or [c] that the judgment of the Court before whom the appellant was convicted should be set aside on the ground of a wrong decision on any question of law, or [d] that on any ground there was a miscarriage of justice, and in any other case shall dismiss the appeal" (*f*). Now, it is to cases falling within those categories that sub-s. 2 relates; and in such a case where the Court of Criminal Appeal are of that opinion, then the Court of Criminal Appeal shall quash the conviction and direct a judgment and verdict of acquittal to be entered.

[VISCOUNT FINLAY: Then it goes on: "and in any other case shall dismiss the appeal."]

Yes; but that is dealing with the case where there is what one may call a substantive trial—a real trial.

(*f*) The sub-s. proceeds: "Provided that the Court may, notwithstanding that they are of opinion that the point raised in the appeal might be decided in favour of the appellant, dismiss the appeal if they consider that no substantial miscarriage of justice has actually occurred."

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[LORD DUNEDIN: I think that Lord Finlay and the Attorney-General are a little at cross purposes. The latter's first argument was upon the Court for the Consideration of Crown Cases Reserved. Lord Finlay's remark had reference to that alone. His second argument was upon s. 1, sub-s. 7, coming in upon the ground that s. 4 is not exhaustive of all possibilities of the situation. That has nothing to do with the words of s. 4 (2), "subject to the special provisions of this Act," which is what Lord Finlay was putting. To make it perfectly clear that you must bring in "special provisions" when you are dealing with the Court for Crown Cases Reserved, would you say that none of the grounds specified in s. 4 would have been grounds which it would have been possible to deal with in a Court of Error?]

No, I am not saying that.

[LORD DUNEDIN: Where you are praying in aid the powers of the Court for Consideration of Crown Cases Reserved, you must say that s. 20, sub-s. 4, is the special provision; but in your first argument it has no application.

VISCOUNT FINLAY: The difficulty I feel about the other way of putting it is that s. 4 does seem to cover the whole ground. It mentions a number of things, and then says: "and in any other case shall dismiss the appeal." Why does it not cover the whole ground?

LORD ATKINSON: It does not cover the case of a mistrial.

VISCOUNT FINLAY: "In any other case"?]

That is founded upon an assumption that what is being dealt with is what one may call a real trial.

[LORD ATKINSON: In any case other than those named the appeal is to be dismissed. A mistrial is not named; so it would not be an irrational thing to dismiss an appeal where there is a mistrial. It is: "in any other case shall dismiss the appeal."]

I can only say that s. 4 does not apply to this case. The

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argument becomes, no doubt, a little metaphysical when one is saying that if there was a trial which was not a trial, the trial was a nullity. The trial was, as I think one of your Lordships said, a cypher.

[LORD SUMNER: The conviction in s. 4 is the same as the conviction in s. 3 (*g*). If there is no such conviction under s. 4 as to make that section applicable, how does the man get into Court at all? How is there such a conviction as to enable him to get his appeal heard?]

Because when one looks at the document there is something which looks like a conviction.

[LORD SUMNER: Then you read s. 3 as "a person convicted on *what looks like* an indictment may appeal under this Act"; and then s. 4: "The Court of Criminal Appeal on any such appeal against *a real* conviction *after a real trial* shall allow"?]

One gets into that kind of difficulty when it is recognised that there may be something which looks like a trial and is not. It is not denied that there is something which appears to be a trial, but the result of the finding of the Court of Criminal Appeal is that the trial was a nullity.

[LORD DUNEDIN: Yet it is a very real conviction. It is something on which the man can be put into prison.]

Yes; and if there had been no appeal he would have suffered imprisonment under that conviction.

[LORD PARMOOR: There was a case before the Court; and, as I understand it, the Court held that s. 4 did not apply, so it made the order under the terms of s. 1, sub-s. 7. That seems to be the order that any reasonable Court would make under the circumstances.]

(*g*) S. 3: "A person convicted on indictment may appeal under this Act . . . (a) Against his conviction on any ground of appeal which involves a question of law alone. . . ."

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At the beginning of the hearing before the Court of Criminal Appeal it may look as if s. 4 did apply, and it may look as if the conviction were what it appeared to be—a real conviction.

[LORD PARMOOR: On the face of it, that would be so.]

On the face of it, it so appears.

[LORD ATKINSON: If he is formally convicted, that gives him the right to appeal.]

If your Lordship pleases. I will not reiterate what has been said by my learned friend.

[VISCOUNT FINLAY: I want to know how far we are going if we hold that this is good as a *venire de novo*. As I understand it, *venire* differs from new trial in this: that the *venire* was granted where there was something wrong in point of form. It has been often, of course, observed that it would be highly beneficial if there were a power of granting a new trial conferred upon the Court of Criminal Appeal. That may be a matter for future consideration; but how far shall we be going if we say that this is a good order for a *venire de novo?*]

In my submission, not the length which your Lordship was supposing hypothetically in the first part of your observations. No doubt experience has suggested to many minds that it would be an advantage if it had been provided that in a proper case there should be a re-trial, a new trial. I am not suggesting that for a moment, or that under the construction of the Act such a course is possible. All I am submitting is that an order in the nature of a *venire de novo* may be made where that which has taken place below, although it has the external appearance of a trial and leads to a conviction, is on the face of it really no trial.

[VISCOUNT FINLAY: *Venire*, as I understand it, was granted in cases where the trial below was not a mere nullity, but where there was something wrong in point of form. What I want to see is whether, if we held it good on that ground, we should be in any

way enlarging the operation of the *venire* beyond the cases in which it was applied under the old practice.]

In my submission, no; because the kind of case which would be upon the other side of the line would be the kind of case which falls within what is enumerated in s. 4, sub-s. 1. It would be a case in which the verdict of the jury could not be supported having regard to the evidence, or the judgment of the Court before whom the appellant was convicted was to be set aside on the ground of a wrong decision on any question of law, or that on any ground there was a miscarriage of justice.

[VISCOUNT FINLAY: In all other cases there must be a verdict of acquittal?]

Yes. No doubt, if these problems had been present to the minds of those who drafted this Act certain expressions might have been different; but the Act being what it is, in my submission it is open to your Lordships, within the expressions that have been employed, to find a reason for dismissing this appeal.

[LORD PARMOOR: Lord Blackburn was of opinion that a man should not be put in peril twice. But if a man has not been in peril at all, your submission is that the trial is a nullity and that he ought to be tried?]

Yes. Looking at it, one finds that although he appeared to be in peril, it was all fanciful.

Matthews, K.C., in reply. The procedure in the present case derives no support from s. 20 (4) of the Criminal Appeal Act, 1907, which transfers to the Court of Criminal Appeal the jurisdiction of the C. C. R. for two reasons: (1) Because the question in the present case did not "arise upon the trial" within the meaning of 11 & 12 Vict. c. 78; (2) Because no case was stated for the opinion of the Court as provided by that Act and kept alive by the Criminal Appeal Act. I submit that the transfer to the C. C. A. by s. 20 (4) of the jurisdiction of the C. C. R. was merely for the purpose of preserving the procedure by case stated where it was considered desirable to adopt that course. I also

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submit to your Lordships that the C. C. A. had "allowed the appeal" in the present case within the meaning of s. 4 (2) in that they had quashed the sentence of imprisonment which the appellant was undergoing at the time that his appeal came on for hearing, and had set aside the verdict. Therefore, by the express language of s. 4 (2), the Court should have directed a judgment and verdict of acquittal to be entered.

[LORD ATKINSON: Is not that order consistent with the view that the Court annulled everything that has occurred in the shape of a trial and have left standing the indictment which was found against him? The order is that judgment and conviction are set aside and annulled, and then it says that he must take his trial upon the indictment. That is: "We annul everything subsequent to the indictment."]

I think they annul everything subsequent to the arraignment. Rightly or wrongly, I submit that Parliament never intended to place in the hands of the Court of Criminal Appeal the old jurisdiction of the Court of Error, nor power to order a new trial for flaws that went to the merits of the case. What is this but a miscarriage of justice? It may not be a miscarriage of abstract justice, regarded wholly apart from procedure; but it seems to me that this is a clear case of miscarriage.

[VISCOUNT FINLAY: You may certainly say that, if it does not fall within the special cases mentioned in s. 4 (1), it falls within the concluding words: "in any other case shall dismiss the appeal."]

Yes, I press that upon your Lordships.

The House took time for consideration.

E. A.

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VISCOUNT FINLAY (*h*): My Lords, an indictment was preferred against Crane at the Leicester City Sessions for receiving skins knowing them to have been stolen. Morton was charged on a

(*h*) The following judgments are printed almost *verbatim* from a transcript of the shorthand notes supplied by the courtesy of the Director of Public Prosecutions.

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separate indictment containing two counts, the one for stealing the other for receiving the skins. Crane and Morton were given in charge to the same jury and were tried together. Crane was found guilty, also Morton. Notice of appeal was given on behalf of Crane on the ground that the verdict was against the weight of evidence and of misdirection, also that the summing up was unfair and the sentence excessive. On the hearing of the appeal it was pointed out from the Bench that there was no joint indictment, and it was suggested that the trial might be a nullity. Lord Chief Justice Reading in giving judgment, after stating the course of proceedings, said:—"At the trial, as we now know, both Morton and Crane were given in charge to the same jury, as if they had been jointly indicted under one indictment, whereas in truth there were separate indictments. The result is that there never has been a trial at all. It is sufficient for this Court to say that the proceedings were *void ab initio*. It has been argued that the proceedings were only irregular, and that where there was an irregularity in procedure, the Court could not treat the trial as a nullity. But that argument cannot be accepted. The Court must view the proceedings as if there had been no trial at all." The Lord Chief Justice proceeded, after citing the cases of *Baker*, *Ingleson*, *Golathan* and *Wakefield*, to say:—"These cases are, in our opinion, authority for the course which this Court proposes to take in this case, that is, to treat the verdict and sentence as a nullity. Following the course taken in *Baker*, the verdict and sentence are expunged from the record. That being so, there is the indictment against the appellant on which no trial has taken place. He must stand his trial on that indictment." The order of the Court was:—"Upon consideration being this day had by the Court of Criminal Appeal, as duly constituted for the hearing of appeals under the Act, of the appeal of the above-named appellant against conviction, the Court doth finally determine the same and doth order that the conviction and judgment on the indictment whereon the appellant was convicted be set aside and annulled, and that the appellant do appear at the next Quarter Sessions to be holden in and for the City of Leicester, there to take his trial according to law upon the said indictment, and that in the meantime the appellant be admitted to bail upon his own recognisance in the sum of 80*l*., and upon the recognisances of two sufficient sureties in the sum of 40*l*. each." Crane appealed against the

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words in the order, "That the appellant do appear at the next Quarter Sessions to be holden in and for the City of Leicester, there to take his trial according to law upon the said indictment." In other words, he asked that judgment of acquittal should be entered. The Attorney-General gave his certificate on the ground that the appeal involved a point of law of exceptional public importance, and that it was desirable in the public interests that a further appeal should be brought.

It was contended on behalf of the defendant at your Lordships' bar that the Court of Criminal Appeal must, if they allow an appeal against a conviction, quash the conviction and direct a judgment and verdict of acquittal to be entered. The question turns upon the terms of the Act setting up the Court of Criminal Appeal, the Criminal Appeal Act, 1907 (7 Edw. 7, c. 23). S. 1 of that Act provides for the constitution of a Court of Criminal Appeal, and by sub-s. 7 enacts: "(7) The Court of Criminal Appeal shall be a superior court of record, and shall, for the purposes of, and subject to the provisions of this Act, have full power to determine, in accordance with this Act, any questions necessary to be determined, for the purpose of doing justice in the case before the court." S. 3 gives the right of appeal on certain grounds. "A person convicted on indictment may appeal under this Act to the Court of Criminal Appeal:—(a) against his conviction on any ground of appeal which involves a question of law alone; and (b) with the leave of the Court of Criminal Appeal, or upon the certificate of the judge who tried him, that it is a fit case for appeal against his conviction on any ground of appeal which involves a question of fact alone, or a question of mixed law and fact, or any other ground which appears to the court to be a sufficient ground of appeal; and (c) with the leave of the Court of Criminal Appeal against the sentence passed on his conviction, unless the sentence is one fixed by law." It is necessary also to refer to the first and second sub-sections of s. 4:—"(1) The Court of Criminal Appeal on any such appeal against conviction shall allow the appeal if they think that the verdict of the jury should be set aside on the ground that it is unreasonable or cannot be supported having regard to the evidence, or that the judgment of the court before whom the appellant was convicted should be set aside on the ground of a wrong decision of any question of law, or that on any ground there was a miscarriage of justice, and in any other

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case shall dismiss the appeal: Provided that the court may, notwithstanding that they are of opinion that the point raised in the appeal might be decided in favour of the appellant, dismiss the appeal if they consider that no substantial miscarriage of justice has actually occurred. (2) Subject to the special provisions of this Act, the Court of Criminal Appeal shall, if they allow an appeal against conviction, quash the conviction and direct a judgment and verdict of acquittal to be entered." S. 5 is as follows:— "(1) If it appears to the Court of Criminal Appeal that an appellant though not properly convicted on some count or part of the indictment, has been properly convicted on some other count or part of the indictment, the court may either affirm the sentence passed on the appellant at the trial, or pass such sentence in substitution therefor as they think proper, and as may be warranted in law by the verdict on the count or part of the indictment on which the court consider that the appellant has been properly convicted. (2) Where an appellant has been convicted of an offence and the jury could on the indictment have found him guilty of some other offence, and on the finding of the jury it appears to the Court of Criminal Appeal that the jury must have been satisfied of facts which proved him guilty of that other offence, the court may, instead of allowing or dismissing the appeal substitute for the verdict found by the jury a verdict of guilty of that other offence, and pass such sentence in substitution for the sentence passed at the trial as may be warranted in law for that other offence, not being a sentence of greater severity. (3) Where on the conviction of the appellant the jury have found a special verdict and the Court of Criminal Appeal consider that a wrong conclusion has been arrived at by the court before which the appellant has been convicted on the effect of that verdict, the Court of Criminal Appeal may, instead of allowing the appeal, order such conclusion to be recorded as appears to the court to be in law required by the verdict, and pass such sentence in substitution for the sentence passed at the trial as may be warranted in law. (4) If on any appeal it appears to the Court of Criminal Appeal that, although the appellant was guilty of the act or omission charged against him, he was insane at the time the act was done or omission made so as not to be responsible according to law for his actions, the court may quash the sentence passed at the trial and order the appellant to be kept in custody as a criminal lunatic

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under the Trial of Lunatics Act, 1883, in the same manner as if a specified verdict had been found by the jury under that Act." The only other provisions to which it is necessary to refer are the first and fourth sub-sections of s. 20:—"(1) Writs of error, and the powers and practice now existing in the High Court in respect of motions for new trials, or the granting thereof in criminal cases, are hereby abolished. (4) All jurisdiction and authority under the Crown Cases Act, 1848, in relation to questions of law arising in criminal trials which is transferred to the judges of the High Court by section 47 of the Supreme Court of Judicature Act, 1873, shall be vested in the Court of Criminal Appeal under this Act, and in any case where a person convicted appeals under this Act against his conviction on any ground of appeal which involves a question of law alone, the Court of Criminal Appeal may, if they think fit, decide that the procedure under the Crown Cases Act, 1848, as to the statement of a case should be followed, and require a case to be stated accordingly under that Act in the same manner as if a question of law had been reserved." The clause mainly relied upon by the Appellant was s. 4 (2), which provides that, "subject to the special provisions" of the Act, the Court "shall, if they allow an appeal . . . direct a judgment and verdict of acquittal." It was argued that there is no "special provision" in the Act which authorises the direction in the order that the appellant should appear at the next Quarter Sessions to take his trial upon the indictment. It appears to be clear upon the terms of the Act, s. 4 (2), that if an appeal is allowed, an acquittal must be entered unless there is something to the contrary to be found in the special provisions referred to in the sub-section.

The Crown relied greatly upon the 7th sub-section of s. 1 as giving a general power to make orders according to the circumstances of the particular case. I am unable to read the sub-section in this way. There are no words in it which authorise the making of any order. All that it does is to give "full power to determine in accordance with this Act any questions necessary to be determined for the purpose of doing justice in the case before the Court." There is no general power here to make any order which the Court thinks justice requires. The power, and the only power, conferred is to determine any question necessary to be determined for the purpose of doing justice in the case. It appears to me that it would be contrary to all principles of construction to con-

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strue these words as giving power to make any order other than those authorised by the Act. What it does is to authorise the Court "to determine in accordance with the Act" any question necessary to enable it to see that the order made does justice, and this power is conferred "subject to the provisions of this Act." Justice might require a new trial, but there is no power to order it.

A good deal of argument was devoted to s. 4 (1). That sub-section provides that the appeal shall be allowed in four cases:— (1) If the Court thinks that the verdict should be set aside on the ground that it is unreasonable. (2) If they think that it cannot be supported having regard to the evidence. (3) If they think that the judgment should be set aside on the ground of a wrong decision on any point of law. (4) If they think that on any ground there was a miscarriage of justice, and goes on to provide that the Court "in any other case shall dismiss the appeal."

There is a proviso that the Court may dismiss the appeal if they consider that no "substantial miscarriage of justice has actually occurred." It was contended for the respondent that this sub-section applies only to cases therein specified, and that the present case is not one of them. But, in fact, this sub-section covers the whole ground and applies to the present case. The Court is to allow the appeal (subject to the proviso) if any one of the four grounds enumerated is made good, "and in any other case shall dismiss the appeal." This sub-section deals with every possible case of appeal. Every appeal either does or does not fall within the four enumerated grounds; in the first case it is to be allowed, always subject to the proviso; in the second case it is to be dismissed. Then follows sub-s. (2), with its enactment that, subject to any "special provisions" of the Act, the Court "shall, if they allow an appeal, . . . quash the conviction and direct a judgment and verdict of acquittal." If the appeal is dismissed there is, of course, an end to the matter, and sub-s. (2) is clear that if the Court allows an appeal there is to be an acquittal subject to the special provisions of the Act. S. 5 makes what appear to me to be "the special provisions" referred to in s. 4 (2). Sub-s. (1) provides for a case in which the "appellant, though not properly convicted on . . . part of the indictment, has been properly convicted on some other . . . part," and gives power either to affirm the sentence passed, or to pass an appropriate sentence. Sub-s. (2) deals with any case in which the "appellant has been convicted

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of an offence, and the jury could, on the indictment, have found him guilty of some other offence," and provides that if it appears to the Court that "the jury must have been satisfied of facts which proved him guilty of that other offence, the court may . . . substitute a verdict of guilty of that other offence." Sub-s. (3) provides for the case of "a special verdict" on which "a wrong conclusion has been arrived at by the court" below, and gives power to the Court of Criminal Appeal to draw the right conclusion. Sub-s. (4) provides for the case of insanity. Each of these provisions (correctly described in the marginal note as "powers of court in special cases") is a qualification of the general enactment in s. 4 (2). They exactly answer the description of "the special provisions," and the section containing them immediately follows s. 4. It appears to me that there are no other parts of the Act which can be made to fit the description in s. 4 (2) of "the special provisions." I have already referred to s. 1 (7), the first case suggested by the respondent as a "special provision" within s. 4 (2). I have given my reasons for my view, that it does not bear the meaning which the respondent seeks to put upon it. But in any case it does not answer the description of a "special provision."

The second case suggested by the respondent as a "special provision" under s. 4 (2) arises under s. 20. S. 20 begins by abolishing writs of error. But for this provision the miscarriage in the present case could have been at once corrected. It would appear on the face of the record that although there were only separate indictments the two men had been tried together. The verdict would have been quashed and a *venire de novo* awarded. The section goes on to abolish "the powers and practice now existing in the High Court" about new trials in criminal cases, so that we must now look only to the provisions of the present Act if there is anything that requires to be set right. The second part of the Act on which the Crown relied as one of "the special provisions" under s. 4 (2) is the fourth sub-section of s. 20. That sub-section vests in the Criminal Appeal Court "All jurisdiction and authority under the Crown Cases Act, 1848, in relation to questions of law . . . in criminal trials," and provides that if there is an appeal "which involves a question of law alone" the Court may "decide that the procedure under the Crown Cases Act, 1848, as to the statement of a case should be followed, and require a case to be stated"

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"in the same manner as if a question of law had been reserved." I respectfully think that it would be a mistake to regard this as one of the "special provisions" within the meaning of s. 4 (2). It is a provision of a general nature about procedure under the Crown Cases Act, 1848. The ingenious argument by which the respondent's counsel tried to show that this clause amounted to a special provision, as I understand it, was this. The Court for Crown Cases Reserved, had, it was said, power to award a *venire de novo*, and this power was transferred to the Court of Criminal Appeal under the general words of s. 20 (4). It is far from clear that the Court for Crown Cases Reserved had this power—indeed there is only one case, so we are informed, in which such a power was exercised by that Court and that case was in 1861. But assuming that the Court for Crown Cases Reserved had that power, would this clause transfer it to the Court of Criminal Appeal? I think not. To get rid of the effect of the precise enactment of s. 4 (2) you must find something in "the special provisions" to the contrary. The transfer of the jurisdiction under the Crown Cases Act is not such a special provision. The enactment in sub-s. 4 of s. 20 cannot override the express provisions of s. 4 (2) unless there were something to show that it was intended so to operate. It is indeed alien to the scope of s. 20 (4) to regard it as anything but a general enactment transferring to the Court of Criminal Appeal the powers of the Court for Crown Cases Reserved. Assuming this latter Court had the power to issue a *venire de novo*, can such a general transfer be regarded as overriding the express enactment that if an appeal is allowed the Court of Appeal shall direct a verdict of acquittal? If anything of the kind had been intended there would have been a special provision to that effect. You cannot rely for such a purpose upon a general enactment under which, amid all the powers of the Court for Crown Cases, lurks the power to order a *venire de novo*. In truth "the special provisions" are the group of provisions in the next section, s. 5. But indeed the Court of Criminal Appeal have not ordered a *venire de novo*. Their order proceeds on the basis that the trial was a nullity, and that the proceedings should simply be resumed at the point where the mistake was made.

It was urged before your Lordships, as it had been urged in the Court of Criminal Appeal, that the whole proceedings at the Leicester City Sessions were a nullity, that there had been in truth

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no trial at all, and that Crane should go to Leicester to be tried on the indictment. It is suggested that the proceedings should simply be taken up at the point at which they stopped; that he was wrongly given into the charge of the jury jointly with Morton; that all the subsequent proceedings at the City of Leicester Autumn Sessions may be regarded as non-existent, and that the trial should now take place. I cannot accept this view of the case. The trial of Crane was not a nullity. But for the fact that it has been quashed by the Court of Criminal Appeal, these proceedings would have been for Crane a very grim reality. The idea appears to be that Crane was tried upon a non-existent indictment in which it was supposed that he and Morton were jointly charged. I do not think that this is a correct view of the situation. Crane was tried upon the indictment against him separately, the only indictment that existed. It is true that a very grave irregularity occurred. Along with him Morton was tried, and this irregularity supplied ample grounds for quashing the conviction which ensued. But to treat the proceedings which followed the giving of the persons in charge as a nullity appears to me to be playing with words. They were so irregular that they have had to be set aside, and the result is that in the terms of the Act there must be judgment of acquittal. The sentence upon Crane would have been a good return to a writ of *habeas corpus*. Proceedings which are a nullity could afford no justification for imprisonment. If the trial was a nullity, the Recorder might forthwith have proceeded to try Crane again without any order from the Court of Criminal Appeal. The same result would have followed if the jury had found Crane "not guilty"—if the proceedings were a nullity there was no trial and no verdict. The theory of nullity does not bear examination. It is not the fact that Crane was tried upon a non-existent indictment. Persons with knowledge of criminal practice may have supposed that there must have been a joint indictment. But in fact there was none, and he was tried on the separate indictment. I do not think that there was any slip in the drafting of the Act. It appears to me that it was the deliberate policy of the Legislature in this Act to prevent any further proceedings such as would have been taken on an award of a *venire de novo* by the Court of Error, or the granting of a new trial by the High Court in criminal cases. If the appeal was allowed, the defendant was to be acquitted, and there was to be nothing which could be

represented as putting a man in peril a second time on a criminal trial. Whatever view may be taken of the policy embodied in the Act, any alteration must be a matter for the Legislature. In the present case it appears that the Act may lead to a grave miscarriage of justice by putting an end to proceedings which have miscarried under a mere blunder at Quarter Sessions. But it does not fall within the province of any court of law to try to correct an occasional injustice arising from a statute by putting a strained construction upon its provisions.

In my opinion the appeal should be allowed.

LORD ATKINSON: My Lords, in this case two persons accused were tried together as if they had been jointly indicted, as they might have been. They were not jointly indicted. On the contrary, an indictment was found against one of them charging him in one count with stealing goods, and in a second count with receiving those goods knowing them to have been stolen, and another and independent indictment was found against the accused, William Crane, charging him with the offence of receiving the goods knowing them to have been stolen. When an accused person has pleaded "Not guilty" to the offences charged against him in an indictment, and another accused person has pleaded "Not guilty" to the offence or offences charged against him in another separate and independent indictment, it is, I have always understood, elementary in criminal law, that the issues raised by those two pleas cannot be tried together. It is obvious that many inconveniences would arise in practice if they were tried together; one amongst them would be this, that in a case where a felony was charged against each the one might by his peremptory challenges put off from the jury many of the very men by whom the other desired to be tried. Whereas had they been indicted jointly and did not join in their challenges they might have been and probably would have been tried in succession, and only those jurors which the person on trial objected to would have been peremptorily challenged. But that consideration is, in my view, quite beside the point. The appellant, William Crane, was never, as far as I can discover, properly arraigned on the indictment found against him. He never pleaded to that indictment, the jury who found him guilty were never sworn to try him separately, and had no jurisdiction to find against him the verdict

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they have found. The whole proceedings were in my view, as against Crane, a mis-trial and a nullity. When the conviction and judgment against him had been set aside and annulled, as they most properly have been by the Court of Criminal Appeal, the indictment found against him stands in my view as if he never had been tried at all. It is, I think, plain that if under the old practice this mis-trial had been brought before the Court of Queen's Bench on a writ of error, the error in the proceedings being set out in full on the record, as it must have been, the verdict and judgment would have been set aside and annulled, and a *venire facias juratores de novo* would have been awarded.

In *R.* v. *Edmonds, &c.*, 4 B. & Ald. 471 [1821], the accused, who was indicted for a misdemeanour, took two challenges, one to the array of the jurors, and the other to the polls, but took them before a full jury had appeared, a fatal defect. These challenges were disallowed. Chief Justice Abbot, in delivering judgment, said: "It must be further observed that the disallowing of a challenge is a ground not for a new trial, but for what is strictly and technically a *venire de novo*. The party complaining thereof appeals to the Court, not for the exercise of the sound discretion of the judges, but for the benefit of an imperative rule of law, and the proper granting or the improper refusing of a challenge is alike the foundation of a writ of error. Every challenge to the array or to the polls ought to be propounded in such a way that it may be put at the time on the *nisi prius* record."

The distinction between a *venire de novo* properly so called and a new trial is here clearly taken. In *The King* v. *Fowler, &c.*, 4 B. & Ald. 273 [1821], the two accused were at Quarter Sessions for the County of Sussex indicted for the felony of stealing. They pleaded "Not guilty," and put themselves upon their county. Upon this indictment they were found guilty. The record stated that after the evidence had been given, and after the jury had retired to consider their verdict, one of the jurors, before the delivery of the verdict, had, without the permission of the justices, separated himself from his fellows and held conversation with a person not a member of the jury concerning the trial and the verdict about to be given. The justices thereupon quashed the verdict given as bad and erroneous, and ordered that a new jury should come before the justices at the next general Quarter Sessions of the Peace of the County of Sussex to be held at Chichester, to

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try whether the defendants or either of them were guilty of the premises charged in the indictment against them. The accused were tried at the Quarter Sessions at Chichester and convicted. A writ of error was applied for in the Court of King's Bench on the ground that the justices so assembled had no jurisdiction to try the accused on the indictment so found. The Court, in giving judgment, said: "The first verdict was either good or bad. If it were good, then the second trial was *coram non judice*, and may be considered a nullity. If on the other hand, the first verdict were bad, inasmuch as the prisoners had put themselves upon the country the prisoners might well be tried at the next sessions, and the second trial is not to be considered in the nature of a new trial, but the first trial is to be considered as a mis-trial and therefore a nullity." See also *Campbell* v. *The Queen*, 11 Q. B. 799 [1846], a decision which, in *Charlotte Winsor's* case, 35 L. J. M. C. 121 [1866], was criticised and approved of by Lord Blackburn. The fact that the trial of Crane was rightly held to be a mis-trial and a nullity does not disentitle him, under s. 3 of the Criminal Appeal Act, 1907, to appeal against it. He is still a person convicted on an indictment within the meaning of that section, since those words cannot mean validly convicted, otherwise the statute would be futile and unworkable. The provisions of s. 4 clearly shew that convictions which the Court of Criminal Appeal decide to be bad may be and are properly brought before them by the person convicted. The very purpose for which the Court was created was to consider whether the convictions of persons who had in fact been convicted were valid or the contrary, and to deal with them accordingly.

The Act of 1907, by its 20th section, abolishes not only writs of error, but in addition the powers and practice of the High Court, as they then existed, in respect of motions for new trials or the granting thereof in criminal cases. As by s. 1, sub-s. 7, of this statute jurisdiction is conferred upon the Court by it created to determine, subject to and in accordance with its provisions, any questions necessary to be determined for the purpose of doing justice in a case before it, one would naturally expect to find that the statute would provide some adequate substitute for the machinery, so protective of the rights of the subject, which by s. 20 it so completely sweeps away. This feature of this statute is in marked contrast with the provisions of s. 5 of the 11 & 12

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Vict. c. 78, which created the Court of Crown Cases Reserved. That section, so far from abolishing writs of error, increased the powers and improved the procedure of Courts of Error dealing with criminal cases. In the important case of *Reg.* v. *Mellor*, Dears. & B. 467 [1858], to be presently referred to, much importance was attached to what was in this respect affected by this s. 5; and it would appear to me that in the construction of the Act of 1907 one is similarly entitled to attach much importance to the sweeping provision of its 20th section. If some adequate substitute be not expressly or impliedly provided for the valuable machinery which is thus taken away, one would be forced to the conclusion that a mischievous and unaccountable blunder, most hurtful to the subject and embarrassing in the administration of justice, had been committed in the drafting of the Act. By sub-s. 4 of this same s. 20, all the jurisdiction and authority under the Crown Cases Act, 1848, in relation to questions of law arising in criminal trials which are transferred to judges of the High Court by s. 47 of the Supreme Court of Judicature Act, 1873, are vested in the Court of Criminal Appeal. It is necessary to consider what is the nature and extent of the jurisdiction and authority thus transferred and vested. The Act of 1848, by its first section, provided that where any person shall have been convicted of any treason, felony, or misdemeanour before any Court of Oyer and Terminer, or Gaol Delivery, or Quarter Sessions, the judge, commissioner, or justices of the peace before whom the case shall have been tried may in his or their discretion reserve any question of law which shall have arisen at the trial for the consideration of the justices of either Bench and Barons of the Exchequer. The judge, commissioner, or Court of Quarter Sessions so reserving this question of law is to state in a case, in the manner usual, the question of law so reserved, with the circumstances under which same shall have arisen, and this case is to be transmitted to the justices and barons (s. 2). The Court of Criminal Appeal may, to an appropriate extent, adopt and follow this procedure where a person convicted appeals against a conviction on any ground of appeal involving a question of law alone (s. 20, sub-s. 4). It is most important to consider what by this same s. 2 of the Act of 1848 the justices and barons are empowered to do when the case comes before them. They are empowered "to hear and *finally* determine the . . . question or questions

and thereupon to reverse, affirm, or amend any judgment which shall have been given on the indictment or inquisition in the trial whereof such question or questions have arisen, or to avoid such judgment, and to order an entry to be made on the record that in the judgment of the said justices and barons the party convicted ought not to have been convicted, or to arrest the judgment, or order judgment to be given thereon at some other Session of Oyer and Terminer, or Gaol Delivery, or other Sessions of the Peace, if no judgment shall have been before that time given, as they shall be advised, *or to make such other order as justice may require.*"

The important question to determine for the purposes of the present case is whether these last ten words empowered the justices and barons, in addition to holding that the trial in which the question referred to them was a mis-trial, to award a *venire de novo*. If they had that power it has passed to the Court of Criminal Appeal under s. 20, sub-s. 4, of the Act of 1907, even if they had not got the same power, which is by no means admitted, under some of the other provisions of this Act of 1907. This question has given rise to a most marked division of judicial opinion in the case of *R.* v. *Mellor*, Dears. & B. 468, already mentioned. In that case Aaron Mellor was tried at the Liverpool Assizes for murder; was convicted and sentenced to death. The jury panel contained the names of two men, one named I. T. and the other named W. T. The name of I. T. was called, when W T. by mistake answered, and was, without objection, sworn. The mistake that had been made was discovered next day, and a question was reserved by Mr. Justice Wightman, who had tried the case, for the opinion of the Court for Crown Cases Reserved as to the effect of what had happened. Fourteen judges, including Chief Justice Lord Campbell, Chief Justice Cockburn, and Chief Baron Piggot, composed the Court which heard and decided the question of law referred. Eight, including the Chief Baron, held that the mistake was only a ground of challenge, did not make the trial which had been held a mis-trial, and apparently held also, but this is not quite so clear, that even if it had made the trial a mis-trial a *venire de novo* could not have been awarded, and that the verdict and judgment should not be disturbed. Six judges, including Chief Justice Lord Campbell and Chief Justice Cockburn, held that this was a mis-trial, and that a *venire de novo*

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could properly be awarded. The ground the minority chiefly relied upon to shew that the trial was a mis-trial was that the mistake interfered with the prisoner's right of challenge, inasmuch as he might well have had no objection to the juror whose name was called, but every objection to the juror who was sworn had he known who that juror really was. The six learned judges who composed the minority were Chief Justice Lord Campbell, Chief Justice Cockburn, Justices Coleridge and Wightman, and Barons Martin and Watson. The majority was composed of Chief Baron Pollock, Justices Erle, Williams, Crompton, Crowder, Willes, Byles, and Baron Channell. Chief Justice Lord Campbell delivered an exhaustive judgment, reviewing all the authorities, and held that the language of the statute should be liberally construed; that the trial was a mis-trial, and that the words "or make such other order as justice may require" justified the award of a *venire de novo* when there was a mis-trial. The remaining five judges forming the minority apparently agreed with him, but while the judges of the majority apparently held that there had been no mis-trial, they did not agree about the grounds upon which they respectively based their opinions that even had there been a mis-trial a *venire de novo* could not have been awarded. For instance, Chief Baron Pollock relied much on the existence of the power expressly preserved to an accused person by the Act of 1848 to proceed by writ of error. Mr. Justice Williams held that the question referred to was not a question of law arising at the trial within the meaning of the statute, since the mistake was only discovered after the trial had concluded, and that therefore the Court had no jurisdiction to deal with it. Mr. Justice Crompton relied upon the fact that there was no record of fact found by the judge before them, but seemed to think that there was no power in the Court to grant a *venire de novo*. Crowder J. thought there was no mis-trial, but doubted whether the case fell within the statute. Mr. Justice Willes agreed with the Chief Baron, and Baron Channell based his opinion that there could be no *venire de novo* on this ground, that the statute required that the Court should "hear and finally determine the question" referred. There was not, of course, any means of reviewing the decision of the Court for Crown Cases Reserved touching the construction thus put upon the Act which called it into existence, or the nature and limits of its powers and authority. It is

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extremely difficult to say whether the result of all the conflicting opinions delivered in the case was not this, that in a case where there has, as in the present case, been a real and undoubted mis-trial, the Court had power to award a *venire de novo*. The learned judges composing the majority do not, it would appear to me, seem to have ever faced the difficulty which would arise in a case like the present, where the trial in which the verdict found was such a mis-trial that the conviction could not by any possibility be lawfully affirmed, and yet justice imperatively required that the accused should be tried on the indictment found against him. In the doubt and difficulty which the decision in *Reg.* v. *Mellor* leaves one, the decision in the case of *Reg.* v. *Yeadon*, 9 Cox, C. C. 91 [1861], becomes more important and helpful. The Court there was composed of Chief Baron Pollock, Justices Wightman and Williams, Barons Martin and Channell. Of these Chief Baron Pollock, Mr. Justice Williams, and Baron Channell had formed three of the majority of eight which had decided that case of *Reg.* v. *Mellor*. In *Reg.* v. *Yeadon*, the accused was tried at the Quarter Sessions for the West Riding of Yorkshire at Bradford under the 14 & 15 Vict. c. 100, s. 29, and 14 & 15 Vict. c. 19, s. 4, on an indictment containing three counts; the first charged him with inflicting grievous bodily harm on a person named, the second with unlawfully and maliciously cutting and wounding this person, the third with assaulting and occasioning to him actual bodily harm. The indictment did not contain any count for a common assault. The jury found the accused guilty of a common assault. The Chairman at Quarter Sessions refused to receive this verdict, owing to the absence of the count for common assault, and told the jury they should reconsider their verdict. The jury then returned a verdict of guilty, and the verdict entered up was "guilty of an assault occasioning actual bodily harm." The accused was accordingly sentenced. The opinion of the Court for Crown Cases Reserved was asked on the question whether the verdict of guilty of common assault should have been taken, and whether it was tantamount to an acquittal, or whether the verdict should stand, and the accused should undergo his sentence. The Court unanimously decided that the verdict of "guilty of a common assault" should have been accepted; that the second verdict ought not to have been taken; that the accused should not have to undergo the sentence; that there had been a mis-trial, and awarded a *venire de novo* to

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Quarter Sessions. I cannot find in any of the reports of this case that there was a single suggestion made that the Court were precluded from thus awarding a *venire de novo* by the decision in *Reg.* v. *Mellor*. This is, I think, a positive decision by a Court of great authority, that the Court for Crown Cases Reserved has jurisdiction where there has been a real mis-trial to award a *venire de novo*. In the present case, what is ordered is not a *venire de novo* in so many words, but a new trial, but where there has been a *mis-trial*, and relief is demanded as a matter of strict legal right on a point of law, no appeal being made to the discretion of the Court, there is little, if any, difference between the two. Where in the case of a trial for felony an irregularity occurs which is not sufficient to constitute a ground for treating the verdict as a mis-trial and a nullity, it may be that a new trial cannot be granted: *Reg.* v. *Murphy*, L. R. 2 P. C. 535 [1869]. In *R.* v. *Dickman*, 74 J. P. 449 [5 Cr. App. R. 135: 1910], L. Alverstone expressed an apparently confident opinion after *Reg.* v. *Mellor*, *R.* v. *Edmonds*, and *R.* v. *Fowles* had been cited to him, that if the defect in the trial complained of was such as to make the trial a mis-trial, the Court of Criminal Appeal would have jurisdiction to annul the verdict and judgment, and to award a *venire facias de novo*. The decision in *Reg.* v. *Martin*, L. R. 1 C. C. R. 378; 12 Cox, C. C. 204 [1872], does not appear to me to be to any extent irreconcilable with the decision in *Reg.* v. *Yeadon*. In *Reg.* v. *Martin* a jury was permitted to view the *locus in quo* where the crime was alleged to have been committed. Some of the witnesses accompanying some members of the jury were alleged to have conversed with those members. But this allegation was not enquired into or ascertained by the judge to be true. It was decided that the Court could not act on this story, which was mere hearsay, and the conviction was accordingly affirmed. The jurisdiction and authority enjoyed by the Court for Crown Cases Reserved has, in my opinion, been transferred by the Act of 1873 to the Supreme Court of Judicature, and by the 20th section of the Act of 1907 is now vested in the Court of Criminal Appeal.

In my view the Court for Crown Cases Reserved had jurisdiction and authority where a mis-trial occurred to annul and set aside the verdict found and the judgment entered up upon it, and as a necessary result demanded in the interest of justice, to direct that the accused be tried on the indictment found against him.

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If that be so, there is nothing I think in the Act of 1907 to take away or diminish in any way that jurisdiction or authority as now vested in the Court of Criminal Appeal. This results from the special provision of the Act contained in s. 20, sub-s. 4, to which s. 4, sub-s. 2, is subject. If this were not so this absurd result would follow—that in the case of a mis-trial, which is actually no trial at all, the Court of Criminal Appeal would be obliged when they annulled the conviction in such a case as this to direct an acquittal of the accused, though they at the same time decided that he had never been tried at all. It is unnecessary in this case to decide whether the provisions of s. 1, sub-s. 7, empower the Court of Criminal Appeal to grant a new trial in a case in which there has not been a mis-trial. I think the appeal fails.

My Lords, I am requested by my noble and learned friend Lord Dunedin to mention that he concurs in the judgment I have just read.

LORD SUMNER: My Lords, the statement of counsel, who defended the appellant at the trial and appeared for him in the Court below, shews that in the belief of all concerned the appellant was tried at Leicester on an indictment which charged him, jointly with David Morton, with the offence for which a conviction was recorded against him. In fact there was no such indictment. The judgment of the Lord Chief Justice shews that the same view of what had occurred was accepted in the Court of Criminal Appeal. So tried, Crane was invalidly tried, and the conviction was without authority. I see no ground for thinking that in reality there was a valid trial, namely, the trial of the appellant on the separate indictment, which had been framed against himself, while at the same time another person, Morton, also separately indicted, was being tried in reality separately, though to all appearances jointly with Crane, both simultaneously undergoing the same procedure before the same jury, and sharing in the evidence, the speeches, and the summing up. How the mistake came about does not now matter, but it is clear that it was purported that the appellant was tried and convicted on an indictment which did not exist. It was a mis-trial, and in truth no trial at all. All the same convicted Crane was, and to all appearance convicted on an indictment. I think he was so far "a person convicted on indictment" within s. 3 of the Criminal Appeal Act, 1907, as to be competent to appeal.

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against this conviction to the Court of Criminal Appeal. Were it otherwise Crane, who has never had a legal trial at all, though imprisoned under sentence on the strength of it, would have to serve his time and apparently be without remedy. If so it must surely follow that this appeal is within the words "any such appeal" in s. 4, and as there was a miscarriage of justice (for such it is to deprive an accused person of the protection given by essential steps in criminal procedure), the Court was bound to allow his appeal, in the sense of quashing a *de facto* conviction, which was in law a nullity. Therefore by s. 4 (2), it became the duty of the Court having quashed the conviction to order a verdict of acquittal, but this duty was subject to the special provisions of this Act. What are they? To the view that s. 1 (7) and s. 20 (4) are not included among them, but that they consist solely of the provisions of s. 5, I have found myself unable to agree. What is subject to the special provisions of the Act is the direction which s. 4 (2) gives to the Court, if it allows an appeal against conviction. S. 5 provides powers, which the Court may exercise in special cases, if it does not allow an appeal against conviction, but does not think fit to dismiss the appeal, viz., to substitute another sentence or another verdict for that actually passed or found, to record a different conclusion from that drawn at the trial from a special verdict, and in cases of insanity to substitute detention in an asylum for criminal lunatics for the sentence of imprisonment passed at the trial. These are not exceptions from or limitations upon the direction to enter a verdict of acquittal, where an appeal against conviction is allowed, and accordingly the provisions of s. 5 do not satisfy the initial words of s. 4 (2). These "special provisions" are to be sought elsewhere, and are, or at least include, s. 1 (7) and s. 20 (4). By s. 1 (7), the Court has "full power to determine, in accordance with this Act, any questions necessary to be determined for the purpose of doing justice in the case before the court," and after quashing the conviction described, the Court had next to determine the question how a man who had not been legally tried should now be dealt with. To enter a verdict of acquittal would only be "doing justice" if the jury, in circumstances which made it their duty to render some verdict, had rendered a verdict of guilty, which ought to have been one of not guilty. If the fact be, as it is here, that the appellant should not have been given in charge to

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the jury as he was, or have been made the subject of any verdict at all, but should have had the proceedings stopped at the outset, it would not be doing justice to enter a verdict of acquittal in favour of a man who was not entitled to be acquitted under the circumstances. Acquittal implies that a true legal trial has been had. Here there has legally been none at all, but only the semblance of one, a mis-trial, which does not count.

The question then arises, what is to be done with the appellant for the purpose of doing justice? He has been duly committed for trial, and ought to be tried, but tried he has not been. S. 1 (7) empowers the Court to determine this question, and this is one of the special provisions of the Act, whether it be also an ancillary or incidental provision or not. It is a special power of the Court, and the Act specially provides for investing the Court with this power. It is true that the sub-section does not mention the making of orders, but, apart from the point that the order appealed from might have stopped at the word "annulled," and that the rest of it might be treated as surplusage, and apart from the effect of s. 20 (4) as providing the power to make the actual order required, it seems to me that the power of determining questions, which have to be determined, is equivalent to power to state what, in accordance with the Act, is the result and effect of the determination. How was this power exercised in this case? It may be that the Court might have been content to declare that there had been no true trial, leaving the appellant, as a person in custody under the warrant of a committing magistrate, to take his trial in due course of law. If so, part of the order actually made was surplusage, and gave expression to what would have happened, even if it had not been expressed. It may be that the residue of the order should be regarded as a provision for the benefit of, and probably made at the request of, the appellant, for it allowed him bail and properly fixed the time, place, and purpose of his surrendering. It is not necessary to express any opinion on these points. Another "special provision" of the Act is s. 20 (4). Its earlier part specially provides for the transference to the Court of Criminal Appeal of the jurisdiction of the Court for Crown Cases Reserved, which has already been vested in the judges of the High Court by 36 & 37 Vict. c. 66, s. 47. The Crown Cases Act, 1848, provided for jurisdiction in relation to questions of law arising in criminal trials. The remainder of

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s. 20-(4) of the Act of 1907 refers to the stating of a case, and is separate from the earlier part, which alone is here material. My Lords, in my opinion this jurisdiction and authority included an authority to provide for just such a case as the present. It is a very necessary authority, which certainly existed before 1907, and for its abandonment without anything to take its place no reason can be assigned. The Court for Crown Cases Reserved was, in matters coming before it, the final tribunal. What it decided, on the construction of the Act which constituted it, even about its own powers, was subject to no judicial review, and became binding upon the subsequent decisions and procedure of the Court. I think it clear, in spite of what is said in *R.* v. *Wakefield,* 1918, 1 K. B. 217 [13 Cr. A. R. 56], that the Court in *R.* v. *Mellor* decided by a majority that it had power, where there had been a mis-trial, to set aside any conviction obtained upon it and to order a proper trial to be had, and this decision was given effect to in *R.* v. *Yeadon.* Though a majority of the judges affirmed the conviction in *R.* v. *Mellor,* it will be found that those who were of opinion that the Court could award a *venire de novo* were actually six, as against five only who declare that there was no such power. Some doubt on the matter was expressed subsequently in *R.* v. *Martin.* It was not necessary to the decision and was, I think, unnecessary altogether, but I am aware that after the decision in *Rex* v. *Dyson* [1908, 2 K. B. 454; 1 Cr. A. R. 15] there was a good deal of difference of opinion in the profession upon the point. In *Rex* v. *Dickman* [above] Lord Alverstone stated, after examining *Reg.* v. *Mellor* and *Reg.* v. *Yeadon,* that in his opinion this power had been transferred to the Court of Criminal Appeal. Whether the power was to award a *venire de novo* or only to order a trial to be had seems immaterial now. Differences of expression on the point (for I will not call them differences of opinion) are to be found in *Reg.* v. *Mellor,* but what was ordered in *Reg.* v. *Yeadon* was a *venire de novo.* In the order made in the present case this term is not used. If there be a distinction, it is in favour of affirming the order now appealed from.

The "jurisdiction and authority . . . transferred" in 1873 and now enjoyed by the Court of Criminal Appeal is that which then existed and could not then be legally questioned. What opinion your Lordships might now entertain on the accuracy of the reason-

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ing of the different judges who gave opinions in *Reg.* v. *Mellor* cannot affect the meaning of the Act of 1907, for it transfers an actual authority then legally existing, not such authority, be it less or more, as your Lordships might have held to exist before 1907, if you could then have been consulted upon the matter. I am, therefore, of opinion that one of the "special provisions" of the Act of 1907 is to give the Court of Criminal Appeal authority to order the appellant to stand his trial, as he did. S. 20 (4) does not merely transfer a power concerning procedure. It transfers all jurisdiction and authority under the Act of 1848 with respect to questions of law arising in criminal trials, and, if such jurisdiction and authority lawfully included the making of such an order as that under appeal, I think a "special provision" within the initial words of s. 4 (2) is to be found in s. 20 (4). I also wish to say that I do not agree with the argument for the appellant, that the intention of this Act was to give the Court of Criminal Appeal in an appeal against conviction a choice only between affirmation and acquittal. No satisfactory explanation consistent with such a view can be given of the words, "Subject to the special provisions of this Act," in s. 4 (2); nor can I see in what case, on such a construction, any effect can be given to that part of the authority of the Court for Crown Cases Reserved which consisted in the power laid down and enjoyed in *Reg.* v. *Mellor* and *Reg.* v. *Yeadon*. In effect the argument would reduce the word "all" in s. 20 (4) to "some." On the other hand, though the matter does not strictly arise for decision now, I do not wish it to be supposed that I think that either s. 1 (7) or s. 20 (4) invests the Court with power to grant new trials independently of such mis-trials as this case illustrates.

My Lords, I think the appeal fails.

LORD PARMOOR: My Lords, the appellant, Crane, was separately indicted for receiving stolen goods, and a man named Morton was separately indicted for stealing and receiving the same goods. Owing to some mistake which was not discovered until the appeal was brought before the Court of Criminal Appeal, Crane and Morton were tried together, as though they had been jointly charged in one indictment. The result is that Crane was not tried on the indictment on which he had been charged, and the trial is a nullity. I think it is impossible to hold that it is

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within the competency of any criminal court to try a prisoner on an indictment which, so far as he is concerned, is non-existent. If the facts had been brought to the notice of an assize judge, or a chairman of quarter sessions, before the assize or sessions had terminated, the mistake could have been rectified, and Crane might have been tried on the separate indictment. No plea of former acquittal or former conviction for the same offence could have been effectually raised by him. A trial void *ab initio* cannot result either in acquittal or conviction, and Crane would have stood in the position of an untried prisoner who has been neither acquitted nor convicted on the particular offence.

The question to be decided in the appeal is, whether on an appeal to the Court of Criminal Appeal the order of the Court in setting aside and annulling the conviction and judgment on the indictment and ordering Crane to appear at the next quarter sessions to be holden in and for the city of Leicester, there to take his trial according to law upon the separate indictment, admitting him in the meantime to bail upon his recognisance and upon the recognisances of two sufficient sureties, is an order which the Court has power to make. The case depends upon the construction of the Criminal Appeal Act, 1907. Crane was entitled to appeal under the Act as a person against whom a record of conviction stood at the time when he entered his appeal. It was argued on behalf of Crane that an appeal against conviction necessarily comes within s. 4 of the Act of 1907. Sub-s. 2 of this section enacts that the Court shall, subject to the special provisions of the Act, if they allow an appeal against conviction, quash the conviction and direct a judgment and verdict of acquittal to be entered. The effect of this provision is to maintain as a fundamental principle of the criminal law, that no man should be placed in peril twice for the same offence; but as stated above, Crane has not in my opinion been in peril, and there has only been a form of trial which is void *ab initio*. Sub-s. 1 of the section enacts that the Court in an appeal against conviction shall allow the appeal if they think that the verdict of the jury shall be set aside on the ground that it is unreasonable or cannot be supported, having regard to the evidence, or that the judgment of the Court before whom the appellant was convicted should be set aside upon the ground of a wrong decision of any question of law, or that on any other ground there was a miscarriage of justice, and in any other

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case should dismiss the appeal. In a void trial there is neither conviction, verdict nor judgment. Crane, therefore, fails to bring himself within the protection of s. 4.

It was argued on behalf of the Crown that sub-s. 7 of s. 1 authorised the Court to make the order which they made in this case. It was necessary, in my opinion, for the purpose of doing justice in the case before the Court, to determine whether the conviction and judgment should be regarded as a nullity, and, in the event of the Court coming to that conclusion it was their duty so to decide. This covers the first portion of the order. I think that the order would be complete if it stopped at the word "annulled," but that a convenient and proper form has been adopted in the direction to the appellant to appear at the next Quarter Sessions to be holden in and for the City of Leicester, there to take his trial according to law, and that in the meantime he be admitted to bail. The annulling of the conviction and judgment would in itself leave the appellant liable to be tried on the separate indictment, but there is no informality in giving a definite direction. The result of the order of the Court of Criminal Appeal is in substance the same as the result which would have followed if the mistake had been discovered before the termination of the Leicester Quarter Sessions.

Counsel who argued the case on behalf of Crane dealt exhaustively with the history of criminal law as affected by writs of error or a writ of *venire de novo*. Writs of error have been in terms abolished by the Criminal Appeal Act, 1907. The writ of *venire de novo* is said to have been preserved under sub-s. 4, s. 20. If it were necessary to decide this question, I should be prepared to hold that the Court of Criminal Appeal had a power of issuing a writ of *venire de novo* to the extent that such power had existed in the Crown Cases Act, 1848. Two relevant cases were cited to your Lordships. In *Reg.* v. *Mellor* there was a close division of judicial opinion; but in the later case of *Reg.* v. *Yeadon* [above] a *venire de novo* was granted, although Chief Baron Pollock, a member of the Court, had expressed his opinion adversely to the power of the judges to grant such a writ under the Crown Cases Act, 1848, in *Reg.* v. *Mellor*. No subsequent case was quoted. I think, however, that it is not necessary either to consider the older cases or to use the technical expression of a *venire de novo* when a conviction and judgment on an indict-

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ment are set aside and annulled by the Court of Criminal Appeal on the ground that all the proceedings at the trial were void *ab initio*. In my opinion the appeal should be dismissed.

Questions put:—That the order appealed from be reversed.

The Not-Contents have it.

That the order appealed from be affirmed and this appeal dismissed.

The Contents have it.

Order appealed from a*ffirmed*, and Appeal *dismissed*:—*Minutes of Proceedings, H. L.*, June 6th, 1921.

Solicitors for Appellant—*H. W. Clarkson,* agent for *Simpson and Bennett,* Leicester.

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